This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

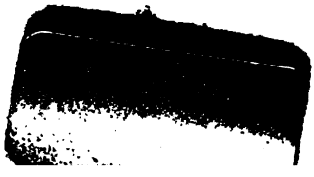
HDI
HL 3YDD F

Digitized by Google

IND. BE.

HARVARD LAW LIBRARY.

Received April 4, 1900.



Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

THE

Weekly Reporter,

APPELLATE HIGH COURT.

CONTAINING

DECISIONS OF THE APPELLATE HIGH COURT IN ALL ITS BRANCHES, VIZ., IN CIVIL, REVENUE, AND CRIMINAL CASES, AS WELL AS IN CASES REFERRED BY THE CALCUTTA AND MOFUSSIL SMALL CAUSE COURTS AND THE RECORDERS' COURTS; TOGETHER WITH RULES AND THE CIVIL AND CRIMINAL CIRCULAR ORDERS ISSUED BY THE HIGH COURT, AND CIRCULAR ORDERS OF THE BOARD OF REVENUE; ALSO DECISIONS OF HER MAJESTY'S PRIVY COUNCIL IN CASES HEARD IN APPEAL FROM COURTS OF BRITISH INDIA.

By D. SUTHERLAND, Middle Temple.

VOL. XXIII.

	Advance.	*Arrear.*
Price	Rs. 20	Rs. 24

Calcutta:
PUBLISHED BY THACKER, SPINK AND CO.
1875.

Digitized by Google

Acc. Apr. 4, 1900.

Digitized by Google

INDEX.

CIVIL RULINGS.

Page.

A.

ACCOUNT-BOOKS.

See Privy Council Rulings (17)

ACCRETION.

See Re-formation (1)

ACT IX OF 1847.

(1) —— was intended to apply only to a subject gained from the sea or from rivers by alluvion or dereliction, *not to land* gained from another proprietor by the changing of a river's course 38

(2) Section 9 does not forbid a suit to recover property which Government or its officers is keeping away from its rightful owners ... 38

Section 6. *See Alluvion* (1)

ACT XIII OF 1848.

See Survey Award (2)

ACT XI OF 1858.

(1) States what an application for a certificate under —— ought to set forth 346

(2) What a Judge has power to do under —— s. 12 is to direct the Collector to take charge of an estate left by a proprietor who, having declared his adoption of a boy, dies before the Lieutenant-Governor's sanction can be obtained; and it then becomes the Collector's duty to appoint a manager and guardian in the same manner &c. as if the minor's property and person were subject to the Court of Wards... ... 348

Section 7. *See Guardian* (1)

Sections 9—12. *See Certificate of Administration* (5)

See Joint Property (1)

See Trust Property (1)

ACT VIII OF 1859.

(1) The main object of s. 128 explained 29

Page.

ACT VIII OF 1859.—*(Continued.)*

(2) Plaintiff's failure to produce evidence on the day fixed for hearing precludes him from bringing a fresh suit with respect to the same cause of action, just as his default would under —— s. 114 ... 59

(3) The words "cause of action" in —— s. 5 need not be interpreted as meaning the whole cause of action 63

(4) Where an application for the appointment of manager under —— s. 243 is made only to put off the payment of the debt, HELD that the Subordinate Judge is not wrong in exercising his discretion and refusing to appoint a manager 287

(5) Where notice under —— s. 216 is issued to the representative of the judgment-debtor and he abstains from showing cause why the decree should not be executed, HELD that the acts of the Court cannot be regarded as nullities such as absolve him from taking notice of them, and entitle him to apply to set aside the execution-sale which follows 310

(6) Where an attaching creditor, dissatisfied with the share allotted to him on a distribution of sale proceeds under —— s. 270, brings a suit against the other attaching creditors, and claims to have made the first attachment, he is bound to include as defendants all who have shared in the distribution ... 434

Section 5. *See Jurisdiction* (2)

Section 6. *See Jurisdiction* (1)

Section 7. *See Cause of Action* (2)

Sections 8 & 9. *See Joinder of Causes* (1)

Section 15. *See Privy Council Rulings* (7) (13)

Section 36. *See Act VII of* 1870 (1)

Section 97. *See Jurisdiction* (12)

Section 119. *See Ex parte Judgment* (1)

Section 190. *See Decree* (8)

Section 200. *See Declaratory Decree* (2)

Section 216. *See Execution* (3)

Digitized by Google

Page.

ACT VIII OF 1859.—(*Continued.*)

Section 230. *See Execution* (16)
Section 246. *See Execution* (10)
Section 249. *See Adjournment* (1)
Section 256. *See Purchaser* (2)
See Decree (12)
Section 259. *See Sale Certificate* (1)
Section 260. *See Privy Council Rulings* (15)
Section 286. *See Certificate* (1)
See Jurisdiction (7)
Sections 324 & 325. *See Privy Council Rulings* (20)
Section 325. *See Arbitration* (2)
Section 348. *See Default* (1)
Section 350. *See Unstamped Documents* (1)
Section 354. *See Remand* (5)
Section 355. *See Special Appeal* (1)
Section 356. *See Remand* (1)
Section 376. *See Review* (1)
Sections 376 & 378. *See Review* (2)

ACT X OF 1859.

—— does not entitle a lessor to raise the rent payable from a lessee on account of a right leased to the latter to collect lac insects from trees growing in the former's lands 458

Section 4. *See Presumption* (1)
Sections 15 & 17. *See Privy Council Rulings* (14)
Section 78. *See Execution* (5)

ACT XI OF 1859.

A landlord cannot, by planting a garden in any portion of his estate, become, *quoad* such plantation, his own ryot, so as to bring the land so planted under the protection of —— s. 37, in the event of his estate being sold for arrears of revenue 387

Sections 11 & 12. *See Declaratory Decree* (1)

ACT XIV OF 1859.

Section 1 cl. 16 applies to a declaratory suit; and where a suit is to have an adoption declared invalid, the only exception to limitation beginning to run from the date of the adoption which is the cause of the action, is that provided in s. 9 42

Section 1. *See Limitation* (2)
Section 5. *See Privy Council Rulings* (4)

ACT XXVII OF 1860.

See Certificate of Administration (1) (2) (4) (5)

ACT IX OF 1861.

See Jurisdiction (11)

Page.

ACT XXIII OF 1861.

Section 3. *See Jurisdiction* (8)
Section 10. *See Arbitration* (2)
Section 11. *See Usufructuary Mortgage* (1)
See Execution (13)
Section 27. *See Jurisdiction* (10)

ACT VI (B.C.) OF 1862.

Section 10. *See Rent Suit* (11)

ACT XX OF 1863.

See Endowment (2)
See Jurisdiction (4)

ACT III (B.C.) OF 1864.

Section 67. *See Municipal Corporation* (1)

ACT XXVI OF 1864.

Sections 7 & 8. *See Original Jurisdiction* (2)

ACT X OF 1865.

Section 187. *See Certificate of Administration* (3)

ACT XI OF 1865.

Zemindaree business is not business of the kind contemplated by —— s. 8 223

ACT XX OF 1866

Section 2. *See Full Bench Rulings* (2)
Section 66. *See Bond* (1)

ACT V (B.C.) of 1867.

See Act VIII (B.C.) of 1869 (4)

ACT VII (B.C.) OF 1868.

(1) Where in a suit for possession of mortgaged property sold under —— on the ground that there had been a fraudulent withholding of rent, and that the mortgagor had purchased benamee, the plaintiff in appeal raises the further question whether the sale conveyed any thing more than the right title and interest of the mortgagor, HELD that the Lower Appellate Court would have been justified in throwing out this plea ... 82

(2) A sale held under the provisions of ——, but improperly and irregularly, can only be questioned by a suit brought within proper time and against proper parties ... 83

(3) A Collector suing to recover rent on account of a tenure in an estate belonging to a ward of Court, which tenure the defendant held under the minor's father, has no power to take proceedings under —— as both Act IV (B. C.) of 1870 s. 75, and Reg. VI of 1822, apply only to tenures which the Collector has himself created during his management ... 362

Digitized by Google

Page.

ACT VIII (B.C.) OF 1869.

(1) Where the Lower Appellate Court dismisses as not maintainable a suit decreed by the first Court in favor of plaintiff, in which a sharer sues a ryot for an aliquot part of the rent making her co-sharers defendants, the decree has determined questions between parties having conflicting claims to an interest in land within the words of s. 102 ... 11

(2) The application of the words of —— s. 29 defined 152

(3) The word "suit" in —— s. 102 covers all proceedings whether prior or subsequent to decree ... 207

(4) The "months" mentioned in —— s. 29 mean calendar months according to the English calendar... 275

(5) Where a suit is brought under —— s. 27, it is for plaintiff to prove that the land is a part of his tenure, and that he has been illegally ejected 383

(6) A suit for rent under Rs. 100 is not taken out of the purview of —— s. 102, by the fact of the rate of rent having been varied by the decision of the Court, unless the Judge determined "the right to vary the rent" 436

(7) The limitation of one year prescribed by —— s. 27 applies only to suits described in it, and the suits to recover the occupancy of any land, &c., referred to therein, are suits which were cognizable by the Revenue Courts under Act X of 1859 s. 23 cl. 6 ... 460

Section 6. *See Right of Occupancy* (2) (4)
Section 21. *See Arrears of Rent* (1)
Sections 35 & 104. *See Jurisdiction* (10)
Section 102. *See Rent Suit* (6) (8) (9)
See Special Appeal (5)
Section 302. *See Jurisdiction* (6)
See Rent (1)
See Special Appeal (10)

ACT XVIII OF 1869.

Schedule II, Art. 11. *See Stamp* (1)

ACT IV (B.C.) OF 1870.

Where a minor's interests are concerned in a suit, the minor must be made a party strictly in the manner prescribed by —— s. 69 348

Section 75. *See Act VII of* 1868 (3)

ACT VII OF 1870.

The provision of finality made by the Court Fees Act, 1870 s. 12 cl. 1, attaches to the value of the suit and not to the value of the stamp; a decision as to whether the full stamp-duty should be paid being appealable under the Code of Civil Procedure, s. 36 296

Page.

ACT VII OF 1870.—*(Continued.)*

ACT X OF 1870.

(1) On a reference under —— ss. 15 & 18, HELD that a refusal of compensation for land below high-water mark is not authorized by any provision of the Act, and the proper compensation for such land, as well as for land above high-water mark, should be determined 73

(2) A Court constituted under —— comes within the meaning of the High Courts Act, s. 15, *i.e.*, is a Court subject to the appellate jurisdiction of the High Court ... 239

ACT IX OF 1871.

(1) The words "as of right" in —— s. 27 do not mean user without trespass, but user in the assertion of a right 52

(2) In —— Sched. II, Art. 129, "adoptive father" must be construed strictly, and not so as to include mother 285

(3) A minor coming of age cannot avail himself of the benefit of —— s. 7 in respect of a right of suit which occurred before his death... 285

(4) No question of *bona fides* arises under —— as to proceedings taken in execution of a decree ... 327

Schedule II, Art. 167. *See Execution* (10) (11)
Section 20. *See Instalment Bond* (1)
Section 27. *See Right of Way* (1)
See Limitation (4) (5)
See User (1)

ACT XXIII OF 1871.

See Imperial Grant of Land (1)

ACT I OF 1872.

(1) Under ——s. 22, no evidence of any oral agreement is admissible to vary the terms of a kobala which is on the face of it an unconditional sale 167

(2) Letters between district authorities are public documents forming a record of the acts of public authorities, and as such admissible as evidence under —— s. 74 ... 272

(3) The right mentioned in —— s. 13 is not a public right only ... 311

(4) A deposition by a person wherein he denied on oath that he had presented a certain petition in Court, which purported to be from him, is held to be inadmissible as evidence under —— s. 33, because the person might have been brought into Court, but was not... 343

Digitized by Google

Page.

ACT I OF 1872.—*(Continued.)*

Section 13. *See Evidence* (6)
See Judgment on Compromise (1)

ACT IX OF 1872.

Section 57. *See Post-nuptial Contract* (2)
See Original Jurisdiction (4)

ACT VI OF 1874.

The Court has no jurisdiction to enlarge the time specified in s. 11 ... 220
See Privy Council Appeal (1)

ADJOURNMENT.

Where a judgment-debtor applies for an —— of an execution-sale to the following month, consenting not to object to any irregularities affecting the sale, and an istehar is proclaimed only in a public place, HELD that, as at the time of his application he did not contemplate any fresh proclamation to be issued on the spot where the properties were situated, he cannot now object to its not having been issued 256
See Joint Property (1)

ADMISSION.

Where parties allow a suit to be conducted in the Lower Courts as if a certain fact was admitted, they cannot afterwards in special appeal question it and recede from the tacit admission 174
See Privy Council Rulings (10)
See Rent Suit (3)
See Survey Award (1)

ADOPTION.

An only son cannot be adopted except by his father's brother, in which case he becomes dwyamushayana. But the mere fact of the existence of a brother's son does not deprive the uncle of the right to adopt any one save that son; the selection being finally a matter of conscience and discretion, not of absolute prescription 340
See Act XIV of 1859 (1)
See Limitation (6)

ADVERSE POSSESSION.

See Limitation (7) (8)
See Under-tenure (1)

AGENT.

An —— retaining his principal's money, which he has not been required to pay, should not ordinarily be required to pay interest; but if his conduct has been fraudulent, he should be charged with interest 325

Page.

AGREEMENT.

See Privy Council Rulings (16)
See Stamp (1)

ALLUVION.

(1) Where a piece of land gained from another proprietor is supposed by the survey authorities to be an addition to a zemindaree and is settled with the zemindar, and an additional jumma assessed, so far as that additional jumma is concerned, the orders of the revenue authorities are made final by s. 6 Act IX of 1847; but they do not take away the right of the proprietor to seek by a suit in the Civil Court to recover his property 38

(2) In a suit for possession of chur lands as re-formations on the original site of plaintiff's or his vendor's lands, or accretions thereto, where limitation is pleaded by defendant in adverse possession, the onus lies on plaintiff to prove that, before disappearance or diluvion, the land in dispute was in the possession of his vendor ... 443

AMENDMENT OF DECREE.

Where the first Court's decree in favor of the plaintiff is upheld in appeal, but in the course of the execution proceedings, the Lower Appellate Court holds that its judgment does not mean to uphold that decree in its entirety, this order was in the nature of an ——, and the ninety days allowed for an application for review should count from the date of such order 433

AMENDMENT OF PLAINT.

In a suit for possession where plaintiff describes himself as the son of B, and defendant, who denies that the land ever belonged to B, claims to hold under a lease and mortgage-deed from one S, and plaintiff, on the day on which the suit was finally disposed of, petitions that he is the son of S, and amends his plaint accordingly, HELD that defendant should have an opportunity to make his defence on the new allegation, new issues being recorded if necessary, and further evidence taken ... 172

ANALOGOUS SUITS.

Where parties to other suits agree to abide by the result of the decision in one, suits should be analogous, so that one decision might decide all the questions at issue 383

Digitized by Google

Page.

ANCESTRAL PROPERTY.

(1) A *bonâ fide* purchaser for valuable consideration of —— sold in execution of a decree, is not bound to go further back than to see that there was a decree, and that the property was liable to satisfy the decree. Where this is done, the heirs of the deceased judgment-debtor are not entitled to come in and set aside the proceedings and recover the property 260

(2) In a suit to recover property in the enjoyment and possession of defendant, a female plaintiff can only succeed on the strength of her own right, not merely because it is the property of her husband who does not object to her recovering it 264

See Hindoo Law (5) (6)

APPEAL.

A *pro-formâ* defendant against whom no judgment has been given, has no right to —— even if another party is found to be the owner of the land which he claims, for such finding carries with it no legal consequences as against him ... 86

See Act VII of 1870 (1)
See Ex-parte Judgment (1)
See Indian Registration Act (1)

APPELLATE COURT.

(1) An —— finally determining a suit is bound to decide by which of the parties before it the costs shall be borne: it is not at liberty to declare that the costs shall be borne by the unsuccessful party in a suit to be hereafter brought. 89

(2) A point in which no question has been raised in the first Court, and which is not in the line of defence taken there, should not be put in issue by the —— 169

(3) Certain land, belonging to one K, having been sold in execution of a decree against J, his widow and heiress, the auction-purchaser, in attempting to take possession, was resisted by S, the brother of the deceased. He accordingly sued S for possession. The defendant pleaded that he had purchased the land under a kobala from K, and that neither J, nor his widow, had been in possession within twelve years. Both pleas were overruled by the first Court, who decreed the suit. The Judge in appeal sent for the execution record and, finding that the decree

Page.

APPELLATE COURT.—*(Continued.)*

was for rent and against the widow, decided that the sale passed her interest only, and not her deceased husband's property; and he dismissed the suit:

HELD that the Lower Appellate Court is not right in making a new case for the defendant.

HELD that if the decree, in execution of which the land was sold, was for arrears of rent due on this particular jote, it is not a personal decree against the widow, but will affect the tenure itself ... 404

See Jurisdiction (5)
See Objection (1)

APPLICATION.

An —— which is pending must be looked upon as a continuous proceeding until it is disposed of 327

ARBITRATION.

(1) Where an——fails, and the record comes back into the Deputy Commissioner's Court, that officer has no power to dismiss the suit with costs, without giving notice to the parties, or fixing a date for the hearing 21

(2) A Court has no discretion to deal judicially with the merits of a case determined by arbitrators, but is bound to pass judgment according to their award. Accordingly, it cannot decree interest which the arbitrators have not awarded ... 105

See Privy Council Rulings (20)

ARREARS OF RENT.

In suits for ——, a Court of justice is not bound in every instance to award interest at 12 per cent., but has discretion either to disallow interest altogether, or to reduce the rate 463

See Act VII of 1868 (3)
See Act VIII (B. C.) of 1869 (2)
See Sale (1)

ATTACHMENT.

See Maintenance (2)

AUCTION-PURCHASER.

The purchaser of a tenant's rights and interests at a sale in execution of a decree of a Civil Court, must, if he wishes to retain the tenure, satisfy any decree for rent for which it is liable 290

Digitized by Google

Page.

B.

BENAMEE.

Parties are not precluded from showing the real nature of a transaction, although it may have been entered into for the purpose of setting up against creditors an apparent ownership different from the real ownership 42

See Bond (1)
See Execution (6)
See Privy Council Rulings (15)

BENGAL COUNCIL.

Quære.—Has the —— power to give to the High Court any appellate jurisdiction not conferred by the Charter? 171

BHAOLEE RENT.

See Waiver.

BONA FIDES.

See Onus Probandi (2)

BOND.

P lends money to S under a specially registered —— pledging immoveable property, and afterwards obtains a decree for principal and interest: more than four years later, he brings a further suit to recover the interest due under the same ——, meanwhile plaintiffs lend money to S under a —— by which the same property is pledged, and recover a decree in execution of which the property is sold. P proceeds to attach the property in execution of his second decree when plaintiffs object but ineffectually, and after that, to protect the property they have purchased, they pay a sum of money into Court, which is subsequently taking out by P: HELD that after execution of P's first decree, he was not entitled to a second decree for interest, so as to reserve a lien upon the property pledged, and had no right to take out the money deposited by plaintiffs. HELD too that, under the circumstances, the payment of the money into Court was not a voluntary payment, and the plaintiffs are entitled to recover ... 344

See Contract (1)
See Privy Council Rulings (3)

BOND SUIT.

In a suit upon a bond where defendant pleads that the bond, though executed in the name of the plaintiff, was really executed in favor of a third party, if it is found that plaintiff is not the real holder, the suit must be dismissed 446

See Jurisdiction (3)

C.

CANCELLATION OF TENURE.

(1) HELD that the decision of the Privy Council in the case of *Khaja Asanoollah* v. *Obhoy Churn Roy* does not apply to a case in which the proceeding of Government shows that it had exercised the power of cancellation: ... 245

(2) HELD that the indulgence spoken of in the decision of the Privy Council in the case of *Khaja Asanoollah* v. *Obhoy Churn Roy*, refers mainly to tenures purchased between 1817 and 1822, but not to tenures created after Regulation XI of 1822 had informed persons that their rights were liable to be cancelled by a purchaser at an auction-sale for arrears of revenue 245

CAUSE OF ACTION.

(1) Where, on the occasion of a butwara of a zemindari the proprietors of an outside talook interfered, and caused the Collector to exclude certain land of an osut talook from the maps and records then made without opposition from the shikmi talookdars, their conduct amounts to making evidence which might eventually be used adversely to the rights of the osut talookdars who, therefore, have a —— against them justifying a suit for a declaratory decree ... 22

(2) In a suit to recover certain sums of money misappropriated by defendant as plaintiff's general agent, where a similar suit had been brought against the same party upon a like allegation as to other sums of money, HELD that all the acts of misappropriation having occurred before plaintiff called upon defendant to render an account, constitute a claim arising out of one and the same —— ... 418

See Act VIII of 1859 (3)
See Dispossession (1)
See Hindoo Widow (1)
See Jurisdiction (2)
See Rent Suit (7)
See Survey Award (1)

Digitized by Google

Page.

CERTIFICATE.

Where a decree-holder having a —— for possession and mesne profits, obtains possession, but delays in respect of the mesne profits, and the case is struck off, and subsequently on the result of an appeal to the Privy Council being in his favor, applies within three years of the Privy Council's decree to complete the execution, HELD that he is entitled to have the mesne profits ascertained without a fresh certificate 225

See Privy Council Rulings (15)

CERTIFICATE OF ADMINISTRATION.

(1) Where the applicant for a —— under Act XXVII of 1860 is the husband as well as the cousin of the deceased, the —— ought to be granted to him alone, and not jointly with another cousin who opposes the application ... 25

(2) A certificate, under Act XXVII of 1860, cannot be refused merely because the deceased was a member of a joint Hindoo family. Ordinarily, the managing member would be the person best entitled to the certificate, but this would not be the case when the members had fallen out 234

(3) *Semble.*—The grant of a —— under Act XXVII of 1860 on the title afforded by the will, gives the grantee the estate in respect of which the debts accrued, but does not establish a right as executor or legatee within the meaning of the words of s. 187 of the Succession Act 252

(4) The receipt of money under a —— does not give a title to the money; the holder only becoming trustee for the person to whom the money belongs 270

(5) In the absence of any ground to remove her summarily, the Court is bound to grant the application of the minor's mother (being a Hindoo) as the nearest relative, and to allow her the management until some cause to remove her is duly made out 330

(6) Where an applicant for a certificate under Act XXVII of 1860 is seventh in descent from a common ancestor through the female line and therefore not a bundhoo, HELD that he is no relative of such ancestor and no heir to the deceased, and is not entitled to a certificate 384

Page.

CHARTER ACT.

(1) Where a suit by a sharer in a talook against a ryot for an aliquot part of the rent in which plaintiff makes her co-sharers defendants, is dismissed by the Lower Appellate Court as not maintainable and comes up to the High Court in special appeal, and the respondent is not in a disadvantageous position in regard to answering the complaint, the Court feels bound to exercise the power vested in it by the —— s. 15 and orders the Lower Court to try the case on its merits 11

(2) Where the Lower Appellate Court having jurisdiction has only erred in the exercise of it, and no appeal is allowed by law, the High Court is not at liberty to exercise its superintending power under the —— s. 15 268

CIVIL COURT AMEEN.

(1) A Court has no power to delegate to an Ameen the trial of one of the most important issues of fact in a case 287

(2) In a suit in which the Court considers it necessary to order an inquiry by a Civil Ameen into the existence and value of moveable properties, such inquiry must be made before the final decree is drawn up 422

See Minor (1)

CO-DEFENDANT.

Where a number of defendants are interested in resisting a suit, judgment cannot be given against all, unless there is evidence binding all 80

COLLECTOR.

See Act XL of 1858 (2)

COMMISSION.

Where a —— to examine a witness on behalf of defendant is returned unexecuted, and the defendant's petition to have it sent a second time is refused both by the first and Lower Appellate Courts, the High Court in special appeal remands the case for the issue of the —— holding that the Lower Appellate Court's refusal is based on insufficient grounds ... 457

COMPENSATION.

(1) In a suit for —— for land appertaining to a ghatwali talook taken for railway purposes, HELD that as

Digitized by Google

Page.

COMPENSATION.—(*Continued.*)

the zemindars had sustained no loss but would continue to receive from Government under Regulation XXIX of 1814, s. 4, the same profits as they had been hitherto enjoying, they were not entitled to any —— 376

(2 In a suit for —— for land appertaining to a ghatwali talook taken for railway purposes, claimed by the representatives of B who had held a sub-tenure in the ghatwali mehal, HELD that as B had not during his lifetime any valid title to any portion of the lands taken but was in possession by the mere sufferance of the ghatwal, his representatives are not entitled to —— 376

(3) In a suit for —— for land appertaining to a ghatwali talook taken for railway purposes, HELD that the plaintiff not being absolute owner, is entitled only to the interest of the —— money, which he is bound to keep intact as a part of the ghatwali property ... 376

See Act X of 1870 (1)

COMPROMISE.

See Execution (13)

CONJUGAL RIGHTS.

(1) Where it is the universal custom for a child-wife to remain away from her husband till a certain event has occurred, a Court is justified till then in refusing to order such a wife to go to her husband although the marriage is valid 22

(2) The marriage of an infant being under the Hindoo law a legal and complete marriage, the husband has the same right as in other cases to demand that his wife shall reside in the same house as himself, except under special circumstances such as absolve the wife from the duty 178

(3) A decree declaring a husband entitled to his —— and ordering his wife to return to his protection, is an order to the wife to live with her husband, &c. 179

CONSEQUENTIAL RELIEF.

See Privy Council Rulings (7)

CONSIDERATION.

See Promise (1)

CONSTRUCTION.

See Deed of Gift (1)
See Forfeiture (1)

Page.

CONTRACT.

Where defendant's property being about to be sold in execution for a sum much more than Rs. 3,000, he is made to appear to borrow from the plaintiff at 75 per cent. interest Rs. 3,000 which is immediately applied to the payment of the debt, the defendant deriving no other benefit and the plaintiff not binding himself to stay execution, HELD that the —— involves the conclusion that the defendant was imposed upon and was not a free agent, and that the transaction could not be supported by a Court of equity 49

See Interest (1)
See Original Jurisdiction (3)
See Right of Way (1)

CONTRIBUTION.

(1) The liability of each of the defendants in a —— suit is not a joint but a several liability 283

(2) Where it is possible for the Court to fix the amount of liability of each of a number of co-debtors in a suit for contribution, the Court should do so 421

See Heir (1)
See Judgment-debtor (1)

CONVEYANCE.

(1) The general rule in India is that upon a contract of purchase and sale, the ownership is acquired by the purchaser though the transaction has not been followed by delivery of possession 131

(2) As a general rule of law, when the vendee has got a ——, *i.e.*, a document which in terms professes to make over the property, and the document is registered, he becomes at once the owner without further ceremony 131

CO-SHARER.

A suit by a —— for possession of a share of landed property is liable to dismissal if all the —— s are not made parties; but his claim for damages in the shape of wasilat is not so liable ... 386

See Declaratory Decree (1)
See Rent (2)

COSTS.

See Appellate Court (1)
See Decree-holder (1)
See Mortgagee (1)
See Privy Council Appeals (2)

COURT OF WARDS.

See Act XL of 1858 (2)

Digitized by Google

Page.

CROSS-OBJECTION.

See Pleading (1)

D.

DAMAGES.

See Entertainment (1)
See Privy Council Rulings (3)

DEBT.

A son's freedom from obligation to discharge his father's —— has respect to the nature of the —— and not the nature of the property. If the —— of the father was contracted for any immoral purpose, the son might not be under any pious obligation to pay it ... 260
See Liability (2)
See Nautches (1)

DECLARATORY DECREE.

(1) In a suit for declaration of title on the allegation that defendant, one of the sharers with plaintiff in a joint estate has been recorded under Act XI of 1859 s. 11, separately in respect of a larger share than that to which he is entitled, HELD that plaintiff, by omitting to appear before the Collector and object to defendant's being registered, has not forfeited his right to the share of which he is in possession, and the suit is one in which it is proper to make a —— 104

(2) A decree requiring a wife to live with her husband is an authoritative decision as to the existence of the relation of husband and wife between the parties, but it is not a decree for the specific performance of a contract, and is not enforceable by the mode pointed out in the Code of Civil Procedure, s. 200 179

(3) A previous ruling (12 W. R., 248) was explained not to mean that a plaintiff must either get the thing he claims, or nothing at all; but that having come into Court upon one title, which he asks to have declared and fails to prove, he cannot claim the declaration of another 437
See Cause of Action (1)
See Possession (3)
See Privy Council Rulings (7, (13)

DECLARATORY SUIT.

See Act XIV of 1859 (1)

DECREE.

(1) Where in a review or appeal proceeding a —— is passed in affirmance of the —— appealed against, the —— of the appellate or reviewing Court is the final —— between the parties, and therefore the —— to be executed ... 57

(2) The parties to a —— have no right to execute it upon the footing of a subsequent arrangement which makes a substantial alteration in the terms of the ——, but must execute, if at all, the original —— itself 129

(3) Where after execution of —— and possession, one of the judgment-debtors prevents a petition objecting that, when execution took place, the —— was barred by limitation, and this petition being rejected by the first Court, an appeal is presented to the Judge, HELD that the appeal ought not to be entertained, the suit having been disposed of and possession given to the judgment-creditor ... 161

(4) A —— on a mortgaged bond entitling the decree-holder to have his lien satisfied by the sale of the rights and interests of the judgment-debtor in all the properties hypothecated cannot be modified by the High Court directing the Court charged with the execution to sell first the judgment-debtor's rights and interests in one portion of the properties pledged, &c., if the proceeds are not sufficient to proceed against the remaining portion 195

(5) Where the final —— in a suit for possession declares that the defendant has a right of occupancy on payment of a proper rent and is liable for rent from the date of suit, without defining the rate of rent, HELD that the —— is imperfect, and that the rent cannot be ascertained in execution, and that another suit is necessary for the determination of the proper rent 228

(6) In a suit where the question is the right to undivided shares of property, a —— should not be given against some only of the shareholders for the recovery of a share, unless it is proved that those shareholders exclusively are in possession of it and interfering with claimant's enjoyment thereof 264

(7) Where a —— is *ultra vires*, the debtor's remedy is either by an application for review or by an application to the High Court to exercise its powers under the Charter Act, s. 15 271

Digitized by Google

Page.

DECREE.—*(Continued.)*

(8) A —— giving possession of a specified quantity of land without defining boundaries is incapable of execution 285

(9) Where a —— is made, that is incapable of execution, the decree-holder's remedy lies in an immediate application to the Court to have it rectified 285

(10) Where a —— in execution of which formal possession has been obtained is impugned by the party in actual possession as fraudulent and collusive, the onus lies on the impugners to prove their allegation 329

(11) Where rival ——s are being executed in the same Court, and the properties mortgaged are attached by all the mortgagees and advertised to be sold, the mouzahs are sold unencumbered with the respective liens of the mortgagees 373

(12) In a suit by a landlord to recover possession where defendant, who was a tenant-at-will, had received no notice to determine his tenancy, and plaintiff obtains a —— to come into operation at the beginning of the next Amlee year:

HELD that there is nothing in the Civil Procedure Code to prevent a —— of this nature being passed 399

(13) When a plaintiff obtains a —— for possession of immoveable property, he must take steps to obtain actual possession, and assert that possession by taking rents or the like; and, if he omits to do so and suffers twelve years to elapse without actual possession, he loses the benefit of his previous ——, and is not entitled to maintain a suit 407

See Amendment of Decree.
See Contribution (1)
See Execution (15) (18)
See Hindoo Widow (3)
See Usufructuary Mortgage (1)

DECREE-HOLDER.

Where the money under a decree is available for payment on the joint application of A the ——, and M whose name has also been registered as a decree-holder owing to a moiety of the amount belonging to him, and M sues A owing to whose passive opposition the money cannot be drawn from the Court, the Subordinate Judge is right in decreeing the claim with costs 14

See Execution (17)
See Liability (1)

Page.

DEED OF GIFT.

Where a father executes a —— in favor of his son with the condition that the son shall take the property subject to the same liability in respect of the maintenance of the family as it was subject to in the hands of the father, HELD that this is not an obligation entered into by father or son as a matter of contract; but a reservation in the father's gift which does not give the son a greater right to be maintained at the expense of the father, or in the family-house, than he had before 236

DEFAULT.

Where an appeal is dismissed for ——, the hearing of objections under Act VIII of 1859 s. 348 cannot be allowed to proceed ... 57

DEMURRAGE.

See Original Jurisdiction (3)

DEPENDENT TALOOK.

See Privy Council Rulings (14)

DEPOSITION.

See Act I of 1872 (4)

DILUVION.

See Privy Council Rulings (2)

DISPOSSESSION.

In a suit to recover possession on the ground of —— by all the defendants in consequence of certain Act X decisions, HELD that there is but one cause of action, and that the fact that the defendants each claim to hold portions of the property under different titles cannot make the suit bad for mis-joinder 400

DOWL.

See Privy Council Rulings (8)

E.

EJECTMENT.

(1) A person unlawfully evicted is entitled, on proof of prior occupation, to be restored to possession, if the party evicting him cannot make out a superior title 293

(2) A putnidar wishing to eject a tenant whose lease has expired, need not give him a written notice to quit; a verbal notice being sufficient 312

Digitized by Google

Page.

EJECTMENT.—(*Continued.*)

(3) In a suit for —— where defendant pleaded possession under a pottah granted to him upon the loss of a mourussee mokurruree pottah and the Moonsiff concluding that the pottah had not been proved, nevertheless found that the tenant had acquired a right of occupancy by holding as a tenant more than 12 years and dismissed the suit, HELD that the Subordinate Judge upon the plaintiff's appeal ought not to go beyond the judgment of the first Court and add a superfluous finding as to the genuineness of the pottah... 332

(4) Where land is given to a lessee for the purpose of building a house to live in, without any term being fixed for the tenancy, the tenure of house and land cannot be taken away from the lessee's heir or his vendee so long as he continues to pay the rent assessed on it ... 399

(5) The "reasonable notice to quit" which a ryot without a right of occupancy may claim from his landlord before he can be ejected, need not be confined to a demand of possession and notice to quit on a certain day. It is sufficient if the landlord asks for a higher rate of rent and gives the ryot notice to quit if he declines to pay it 440

(6) A suit for —— against a tenant-at-will is a sufficient demand of possession and would justify a decree containing a date fixed for —— 440

See Act VIII (B. C.) of 1869 (5)
See Landlord and Tenant (4)
See Onus Probandi (3) (6)
See Right of Occupancy (3) (4)

ENDOWMENT.

(1) Where the objects of an —— are not carried out, it does not follow that the property can be resumed by the heir of the orignial donor as if there was a forfeiture; but some person authorized by law must take steps for securing its profits to the object of the —— 76

(2) Where a Mahomedan widow of the Shiah sect, executes a towleut-namah with a view to perpetuate certain ceremonies in commemoration of her mother's death, involving the recital of prayers in her own Imambara, and the expenses of the first 10 days of the Mohurrum, HELD that the

Page.

ENDOWMENT.—(*Continued.*)

—— is not of a public character coming under the provisions of Act XX of 1863 453

(3) Where a purdanusheen lady makes an appropriation of property, which so far as words go is a wuqf, it still remains to consider whether it was intended by the appropriator to operate as such. Such ladies have a claim to special consideration, particularly where they deny on oath an effectual knowledge of documents which they are said to have made ... 453

See Jurisdiction (4)
See Privy Council Rulings (11)
See Waste (1)

ENHANCEMENT.

In a suit for arrears of rent at an enhanced rate, where the question whether notice had been served has been decided against the plaintiff, there is no reason for trying any other issue 442

See Privy Council Rulings (14)

ENTERTAINMENT.

Persons accepting an invitation to an —— at their neighbour's house, and, afterwards failing to attend, cannot be held liable to recoup the entertainer for the price of the food unconsumed on account of their absence 417

ERROR IN LAW.

See Evidence (4)

ESTOPPEL.

See Benami (1)

EVIDENCE.

(1) Where a later suit is not between the representatives in interest of the parties in the former suit, a deposition made in the former suit is not admissible in the later . 42

(2) A Court of first instance ought not, because it is satisfied with the —— given by one of the parties, prevent him from putting in all the —— he wishes, so that his case may be brought fairly before the Appellate Court ... 63

(3) Where a party has been prevented by the first Court from putting in all his ——, and the —— on the record is not deemed sufficient by the Appellate Court, the latter does wrong in refusing the —— which was excluded by the first Court 63

Digitized by Google

Page.

EVIDENCE.—(*Continued.*)

(4) A complete disregard of —— of such a nature that a judgment in opposition to it cannot be allowed to stand, amounts to an error in law 65

(5) Where the —— before the Lower Appellate Court is not sufficient in law to justify the Court in giving a decree for rent in excess of the amount decreed by the first Court, the High Court in special appeal orders it to be varied by making it accord with the decree of the first Court ... 149

(6) Under the Evidence Act, s. 13, road cess papers and a deed of sale are —— *quantum valeat*; so is a decree, although the party against whom it is treated as —— was no party to it 293

(7) In a suit for arrears of rent, where the tenure had commenced thirty years previously, and had been in the possession of defendant's grandfather, father, and himself without any rent having been paid, HELD that, in deciding whether the relation of landlord and tenant exists between the parties, the Civil Court is entitled to look at —— taken in the Collector's Court being that of witnesses examined and cross-examined by the present defendant when the suit was originally tried there 426

See Act I of 1872 (1) (4)
See Act VIII of 1859 (1)
See Co-defendant (1)
See Ex parte Decree (1)
See Full Bench Rulings (1)
See Issue (4)
See Letter (1)
See Privy Council Rulings (9) (17)
See Will (2)
See Witness (1)

EXECUTION.

(1) It is within a Subordinate Judge's discretion to direct the sale of a property in portions 1

(2) Where the sale of a portion would suffice, the irregularity committed by the District Judge in having the judgment-debtor's whole property sold against his will, causes material injury to him 1

(3) A suit by a judgment-creditor against his judgment-debtor and a third party may count as previous proceedings in —— for the purpose of saving time in regard to the statute of limitation, but it is not "an order passed on a previous application for ——" within the meaning of Act VIII of 1859 s. 216 31

(4) A decree directing payment by instalments ought to be executed to the extent of the instalments falling due within three years before the application for —— ... 41

(5) Where a Moonsiff gives under Act X of 1859 s. 78 a decree for ejectment and the recovery of rent, and the decree is not modified in review, the Lower Court rightly holds that the tenant not having deposited the money within 15 days from the date of the decree, —— should issue to recover possession 50

(6) Judgment-debtors against whom —— is sought are competent to object that it cannot proceed benamee, the party interested being himself one of the judgment-debtors, whenever the fact comes to notice, and are not debarred, by having suffered —— at one instance, from setting up the objection when a further application is made 95

(7) Where the sons of a deceased judgment-debtor, whose estate is declared by the decree to be liable to sale, are admitted on the record as his representatives, they are not entitled, in the —— stage, to re-open the whole case and ask for a decision as to whether the debt incurred by the father was not for the benefit of the estate, or was in some other way invalid under the Hindoo law, and not binding on the joint family ... 127

(8) According to law, no Court has power to execute a decree upon the footing of a kistbundi making a substantial alteration in the terms of the decree 129

(9) A Court having local jurisdiction is competent to sell in —— of a decree one or more outlying portions of an estate, even though the greater portion of that estate is not within its jurisdiction 154

(10) The effect of an order striking off —— proceedings in consequence of an adverse decision against the decree-holder under Act VIII of 1859 s. 246 is not to dispose finally of the application for attachment and sale. And if the result of a regular suit prosecuted with due diligence is a final decree in his favor, and he makes an application for the —— of this decree,

Digitized by Google

Page.

EXECUTION.—(*Continued.*)

such application is in substance one for the continuation of the former proceedings, and is therefore not an application to execute the decree within the meaning of Act IX of 1871, Sch. II, Art. 167 183

(11) Where after partial satisfaction of a decree, the —— proceedings are struck off within three years from a date on which the decree was admittedly alive, and the judgment-creditor subsequently applies for the issue of a notice, HELD that the notice was the only proceeding which the decree-holder could take inasmuch as more than one year had elapsed from the date of the decree, and that such notice constitutes a starting point for the commencement of a new period of limitation 195

(12) Where a property is sold in —— of a money-decree obtained by a second decree-holder, the first decree-holder's lien being notified at the time of sale, and the first decree-holder's representative sues out —— as against the mortgaged property which had been hypothecated, HELD that there is nothing to prevent this —— as all that the auction-purchasers purchased was the rights and interests of the judgment-debtors subject to the aforesaid lien ... 196

(13) Where a refund is claimed of the proceeds of an —— sale on the ground that the decree has been satisfied by compromise, the case ought to be tried under Act XXIII of 1861, s. 11 207

(14) A Moonsiff is right in rejecting an application made on the 1st September 1870 for the further —— of a decree, on the ground that when an application was made on the 19th May 1865 for —— (although proceedings were taken on such application), the decree had been barred by the law of limitation; but his order does not declare the previous proceedings to be invalid or set them aside 257

(15) *Quære.*—What is the effect of not executing a decree for three years? 257

(16) Where a claim made by a third party in the course of an —— proceeding is rejected, the claimant's proper remedy is a regular suit or to wait till dispossessed, and then proceed under Act VIII of 1859 s. 230. 270

Page.

EXECUTION.—(*Continued.*)

(17) The purchaser of a share in a decree cannot be allowed to take out piece meal ——; but the Court may allow the decree to be executed as a whole on his application, taking steps to protect the interests of the other decree-holders... 282

(18) A decree cannot be executed by purchasers of aliquot parts of it 342

(19) Certain decree-holders having been sued successfully for possession by the judgment-debtors in the first Court, appeal to the High Court, who reverse the decision, and whose order is confirmed by the Privy Council. The decree-holders on this apply for —— and for mesne profits for the interval during which they were kept out of possession:

HELD that they are entitled to what they claim in ——, without bringing a regular suit, as the effect of the High Court's decree is to replace the parties *in statu quo* 441

See Act IX of 1871 (4)
See Ancestral Property (1)
See Appellate Court (3)
See Application (1)
See Decree (1) (2) (4) (5) (8) (11) (13)
See Jurisdiction (1) (7)
See Liability (2)
See Limitation (3)
See Mesne Profits (3)
See Mortgage (2)
See Usufructuary Mortgage (1)

EX PARTE DECREE.

Where a suit is tried *ex parte* and no issues of fact are raised beyond the general issue involved in the claim, the decree is only evidence that the amount decreed was at the time due... 149

EX PARTE JUDGMENT.

Where an —— has been set aside and a judgment afterwards come to on trial, and where a regular appeal is preferred, the Appellate Court may take into consideration the regularity of the proceedings of the Court below in making an order under Act VIII of 1859 s. 119. But a District Judge is not competent to entertain a summary or miscellaneous appeal from an order setting aside an —— 147

EXPLANATION.

The Court finds that the inference it had drawn in its judgment in

Digitized by Google

Page.

EXPLANATION.—*(Continued.)*

the special appeal No. 693 of 1874, to the effect that the defendant had been prevented by the District Judge from filing a copy of a certain judgment was in fact erroneous 364

F.

FARM.

Where a —— is given with a reservation of the right to sue for enhancement of rent, the farmer, and not the zemindar, is the person to issue notices and sue thereon 228

FERRY.

See Lease (1)

FIDUCIARY RELATIONSHIP.

See Privy Council Rulings (1)

FINDING.

See Privy Council Rulings (21)

FORECLOSURE.

A decree of the first Court declaring decree-holders entitled to satisfy their decree by the sale of certain hypothecated properties, being reversed by the High Court and affirmed in Privy Council, HELD that the lien established by the Privy Council decree is not lost to the decree-holders by their previous conduct in receiving a portion of the decretal money by the sale of part of the mortgaged premises, which money was subsequently returned by them to the judgment-debtor, on the decision of the Principal Sudder Ameen having been reversed by the High Court 193

See Notice (1)

FORFEITURE.

A condition of —— should not be extended beyond the words in which it is expressed, unless it is otherwise impossible to give a reasonable construction to the instrument in which it appears ... 10

See Endowment (1)

FRAUD.

See Contract (1)
See Onus Probandi (1)

FULL BENCH RULINGS.

(1) A decree is admissible as evidence even if it has become inoperative from not having been executed within the period of limitation ... 129

Page.

FULL BENCH RULINGS.—*(Continued.)*

(2) A creditor who has resorted to the summary procedure provided by Act XX of 1866 s. 53, and has recovered a portion of his claim in execution of the decree so obtained, cannot bring a regular suit *against the same parties* for the enforcement of his remedies under the bond. Of course there may be a right of suit remaining against *third persons* not parties to the first proceedings ... 187

G.

GHATWALEE LAND

See Compensation (1) (2) (3)

GOVERNMENT.

See Cancellation of Tenure (1)

GUARDIAN.

An application for the removal of ——s or parties appointed to take charge of the estate of a minor under Act XL of 1858 s. 7, must be supported by proof of malversation or misconduct, such as would afford sufficient ground for removal ... 278

See Legal Necessity (1)
See Minor (2)

H.

HEIR.

A deceased debtor's —— is only liable to pay the debt out of the property of the deceased which comes into his hands 283

See Judgment-debtor (1)

HIGH COURT ACT.

(1) Before relief is afforded under the —— s. 15, it must be clear that the party seeking it did not contribute by his own conduct to being placed in the position in which he finds himself ... 310

(2) The High Court will not exercise its extraordinary powers under the Charter Act, s. 15, except where jurisdiction has been either exercised or refused improperly: it will not interfere under that Section even where a wrong decision has been arrived at, if the Court which arrived at such decision exercised a jurisdiction which it properly possessed 402

Section 15. *See Act X of* 1870 (2)

Digitized by Google

Page.

HINDOO LAW.

(1) The —— current in Bengal excludes from inheritance persons born blind and deaf, not those who have become so 78

(2) The principle of the Full Bench Decision in 13 W. R., F. B., 49, adopted in a suit disputing the succession to the property of C P deceased, where the plaintiffs were his brother's daughter's sons, and the defendants his paternal grandfather's great grandsons ... 117

(3) The presumption that a Hindoo family is joint in food, worship and estate may be rebutted, and where this is done, the onus is thrown on the opposite side 141

(4) After marriage, a husband is the legal guardian of his wife's person and property whether she is a major or minor 178

(5) The interest which, under the Mitakshara law, a son acquires in the ancestral property of his father, by and in the event of being born, described 365

(6) Under the Mitakshara law, any disposition of ancestral property by a father for the purpose of discharging a debt of the father's, which is not illegal or contracted for an immoral purpose is authorized as "unavoidable" ... 365

(7) A debt contracted by a father is binding upon the son, unless it is of such a nature that he can, under the provisions of the ——, repudiate it 395

(8) In a suit under the Mitakshara law for possession of land by annulment of illegal sales by his father, the plaintiff's only cause of action is the taking possession by the defendant of what was the son's joint share of the family property, and his suit ought to be brought within twelve years of such adverse possession 419

See Adoption (1)
See Inheritance (1)
See Joint Property (1)
See Partition (4)
See Privy Council Rulings (10) (18)
See Succession (2)
See Usage (1)

HINDOO WIDOW.

(1) Where the estate of a deceased Hindoo held jointly by his two widows survives, on the death of one of them, to the surviving widow alone, no cause of action can accrue to the reversioners until the death of the survivor, even in respect of a moiety of the property 125

(2) Where ——s acquire property by advancing money during an interval when they are out of possession of their deceased husband's estate, the money so advanced cannot be presumed to be a part of the proceeds of that estate 125

(3) A decree against a —— in respect of a debt due from her husband, is a decree against her as the representative of her husband's estate and may be executed as such: where the debt has not accrued in the husband's lifetime, the decree against her in a suit to which the reversioner is not a party, is a personal decree ... 174

See Privy Council Rulings (10)

HINDOO WIFE.

See Privy Council Rulings (8)

HOONDEE.

The drawer, acceptor, and intermediate indorsers of a —— which is dishonored are all liable to the holder; but their liability is not joint as it arises out of different contracts: and a decree obtained against any one of them without satisfaction, cannot be pleaded as a bar to a suit against any other of them 444

I.

IMMORALITY.

See Debt (1)
See Nautches (1)

IMPERIAL GRANT OF LAND.

Ruling of the High Court in a suit against the Government and the Mutwallee brought by a descendant of Khajah Anwar Shahad for a share in the annual payment made by the Government in connection with certain lands granted by the Delhi Emperor to the family of the Khajah over whose remains he had built a tomb, for the purpose of maintaining it in the manner usual among Mahomedans; this land having subsequently come into the possession of the Rajah of Burdwan, and the Government having since the perpetual settlement continued the payment on account of the Rajah 378

Digitized by Google

Page.

INDIAN REGISTRATION ACT.

The —— takes away an appeal in proceedings in execution, as well as in proceedings upon which a decree is made 328

INDIGO.

A crop such as ——, which is incapable of being profitably attached for arrears of rent, may be grown on ijmalee land with the consent of the ryots 428

INFRINGEMENT OF RIGHT.

In order to maintain an action upon an ——, it is not necessary to show that there has been any subsequent injury consequent upon such —— 230

INHERITANCE.

(1) According to the doctrine of the Bengal school of Hindoo law, only those illegitimate sons of a Soodra inherit their father's property, who have been begotten by a man of the servile class on his female slave 334

(2) In the Soodra caste, illegitimate children *may* inherit *in certain cases*, and have a right to maintenance *in all cases* 334

See Hindoo Law (1)

See Privy Council Rulings (18)

INJUNCTION.

Where plaintiff sues for perpetual —— against the principal defendants to stop the business of brick-making carried on on lands taken under temporary leases from their co-defendants, and for damages owing to alleged injury to the land, the evidence shows that the land has been used for the purpose for 25 years, and that, instead of being injured, it has been placed by the defendants in a better condition, HELD that no case has been made out for the issue of an —— 299

INQUIRY.

Where an —— has been made by a Commissioner under the Code of Civil Procedure, the Court to which it is reported ought not, unless it annuls the proceedings of the first ——, order another on the same matter 94

INSTALMENT.

See Execution (4)

Page.

INSTALMENT BOND.

An —— is not "a promise or acknowledgment" within the meaning of Act IX of 1871 s. 20, but is complete in itself 462

INTEREST.

(1) Where a Civil Court awards —— under an admitted contract, it is bound to award it at the stipulated rate up to the date of decree; but for any time after that decree date it has power to exercise its own discretion as to the rate of —— to be awarded 309

(2) Where a plaintiff seeks to recover more than what is actually due, and it does not appear that defendant would have refused payment if the sum actually due had been demanded, the Court reduces the rate of —— to 6 per cent. ... 463

See Agent (1)

See Arbitration (2)

See Arrears of Rent (1)

See Bond (1)

See Privy Council Rulings (3)

INTERVENOR.

See Rent Suit (5) (10)

IRREGULARITY.

See Execution (2)

ISSUE.

(1) A Court may try the ——s raised before it in any order most conducive to the ascertainment of the truth 54

(2) A Judge mistakes the principle of judicial determination where instead of the simple ——, "is the plaintiff's allegation proved," he takes up a double —— and places himself under the necessity of choosing between the plaintiff's story and the defendant's ... 87

(3) Where no objection is taken in the grounds of appeal to the ——s as framed in the Court of first instance, and there is not any such contention as that the High Court ought to direct the subordinate Court to raise the proper ——s, the Court refuses to remand the case with this view 158

(4) A plaintiff's case ought not to be prejudiced by his omission to bring proof on a point not put in —— 292

(5) Where two suits, brought by different sharers of one property against the same defendant, are tried by the Moonsiff, without any objection from the defendant on

Digitized by Google

Page.

ISSUE.—*(Continued.)*

the score of jurisdiction, and the Subordinate Judge raises the —— whether the suits were brought separately in order to bring them within the Moonsiff's jurisdiction, and concluding that this was the object, reverses the decision of the first Court:

HELD that the Lower Appellate Court ought not to have raised the ——on its own motion, but to have heard the appeals on the merits ... 409

See Amendment of Plaint (1)
See Appellate Court (2)
See Ejectment (3)
See Jurisdiction (8)
See Possessory Suit (3)
See Rent Suit (10)
See Special Appeal (7)

J.

JOINDER OF CAUSES.

In a suit where there are several distinct causes of action, a Court is competent to try them together against the same defendants; but not as against several defendants 389

JOINT FAMILY.

(1) A Hindoo brother who, during the lifetime of a deceased debtor, was separate in transaction and lived separately from him, and was therefore, not a joint member of the same family, is not his legal representative after death ... 231

(2) A member of a joint Hindoo family is precluded from maintaining a suit for the specific share which would devolve upon him on partition 395

(3) Separate appropriation of profits would, in some cases, be very good evidence of a tacit agreement amongst the members of a joint Hindoo family, to hold their property according to their separate shares ... ... *ib.*

(4) Where two uterine brothers and a half-brother are members of a joint Hindoo family, and one of the two former dies, the brother of the half-blood is not entitled to receive anything out of the share of the deceased ... ... *ib.*

(5) Property purchased by a member of a joint Hindoo family in his own name, must be presumed to have been purchased with money from the family fund, unless it is shown that the money came from the separate funds of the purchaser 422

Page.

JOINT FAMILY.—*(Continued.)*

See Certificate of Administration (2)
See Hindoo Law (2)
See Onus Probandi (5)
See Privy Council Rulings (19)

JOINT PROPERTY.

(1) Where —— is enjoyed in its entirety by the whole family, the interest of one member cannot be taken charge of under Act XL of 1858 206

(2) A suit to recover possession of an undivided share of a putnee talook, where the title to the share as against the zemindar depends upon a grant made to the plaintiff and others ijmalee, cannot rightly proceed until the co-sharers are made parties 275

See Joint Family (3)
See Onus Probandi (5)

JOINT SHARE-HOLDERS.

Where there has been no agreement by a tenant to pay any thing but a simple rent to all the sharers jointly, no sharer can assume to himself a right to a separate payment for what he alleges to be his own share 37

JUDGMENT-DEBTOR.

Where a debt is a judgment-debt, the proper mode of enforcing liability is not by a separate suit, but by prosecuting execution proceedings 28

See Execution (7)
See Heir (1)

JUDGMENT ON COMPROMISE.

A judgment setting out the terms of a compromise in the form of a recital is relevant as evidence under the provisions of Act I of 1872 s. 13 162

JUMMABUNDEE.

See Regulation VII of 1822 (1)

JURISDICTION.

(1) Of a District Judge in respect of calling up an execution case from the file of the Subordinate Judge to his own Court 1

(2) —— of the Subordinate Judge of Moorshedabad where plaintiff's cause of action consists in defendant's refusal to pay the price of certain indigo seed, which payment ought to have been made at the plaintiff's residence at Moorshedabad 63

Digitized by Google

Page.

JURISDICTION.—(*Continued.*)

(3) Where a party suing on a bond, brings his suit in a district other than that in which the property hypothecated in the bond is situated 123

(4) The —— given to Courts by Act XX of 1863 cannot be excluded by any Clause in a deed of endowment 150

(5) Of the Lower Appellate Court in an appeal by one defendant, where the decision of the first Court did not proceed on a ground common to all the defendants 166

(6) Of Civil Courts under Act VIII (B.C.) of 1869 171

(7) Of a Moonsiff, under Act VIII of 1859 s. 286, to bring to sale property lying without his own —— without reference to any other Court 233

(8) Where a Subordinate Judge, after registering a plaint and allowing the parties to go to issue in the question of ——, finds that he has no ——, he does wrong under Act XXIII of 1861 s. 3 in dismissing the suit. He ought to return the plaint to the plaintiff 263

(9) In a suit for arrears of rent of the description known as phulkur ... 304

(10) In a suit for damages for withholding a receipt for rent ... *ib.*

(11) As respects suits regarding minors 340

(12) Where a suit brought in a Moonsiff's Court is withdrawn after issues joined with permission to sue again, the District Judge has no power to question the propriety of the order reserving to plaintiff permission to sue again... 345

(13) A suit for arrears of rent of land for which no rent has ever been paid, where plaintiff asks also for assessment of the rate of rent, is not cognizable in the Small Cause Court 426

See Bengal Council (1)
See Evidence (7)
See Execution (8) (9)
See Issues (5)
See Sale-Certificate (1)

K.

KISTBUNDEE.

A petition put into Court by a judgment-debtor, for time to pay the instalments due under a ——, may be considered as evidence of a new contract formally entered into with the decree-holder and declared in Court 465

See Decree (3)
See Execution (8)

KUDEEMEE HOLDINGS.

Any limitation applicable to rights declared in Act X of 1859 and Act VIII (B.C.) of 1869, does not necessarily extend to holdings which were in existence before those laws were passed, *e.g.*, *kudeemee* or *mourussee* holdings... 36

L.

LAND FOR BUILDING PURPOSES.

See Ejectment (4)

LANDLORD AND TENANT.

(1) In respect of the repairs of buildings, any loss occasioned by the natural operation of time, ought to fall upon the landlord, and not upon the tenant 34

(2) Except in the case of agricultural holdings, ——cannot be compelled to enter into a contract against their inclination, nor can a tenant who holds at an inadequate rent and who has no right to hold at a fixed rate, be compelled by proceedings in the Civil Court to pay a higher rate of rent 61

(3) Where in a suit for declaration of title and possession instituted in consequence of defendant's having successfully intervened as purchaser of the rights of the superior landlord of the plaintiffs in a previous suit for rent brought by them against a korfa tenant, the plaintiffs are at liberty to prove their case quite as much by the fact that the landlord has received rent from them, as by the circumstance that they received rent from the korfa tenant 98

(4) A landlord is entitled to eject his tenant after notice, unless debarred by certain rights of his tenant. He is not required to prove the absence of the circumstances which entitle that tenant to retain possession 238

(5) Even in the case of a tenant from year to year, the landlord cannot evict without giving previous notice to quit 271

(6) Where a——were defendants in a suit by the zemindar for setting aside the putnee, and both were by the decree made liable for the

Digitized by Google

Page.

LANDLORD AND TENANT.—(*Continued.*)

mesne profits which the tenant eventually paid out of his own pocket: HELD that the effect was to cancel all relation of—— between them and to give the tenant a right to receive back what he had paid 303

See Notice (2)

LEASE.

It is quite competent to a lessor, where granting a——of his land to stipulate that no ferry shall be established thereupon to the prejudice of his own ferry (existent or possible), and it is competent to a lessee to agree to such a stipulation 237

See Act X of 1859 (1)
See Forfeiture (1)

LEGAL NECESSITY.

Where one of two minors sues to set aside a sale made by their mother of a part of their estate to meet an *ex parte* decree against them obtained by the lender to the mother and guardian, of money to defray the marriage expenses of the minors:

HELD that it was obligatory on the defendants to prove that, in selling the property, the mother acted under an unavoidable necessity in the interests of her minor sons, and that the decree against the minors was such as would bind their interests 424

LEGAL REPRESENTATIVE.

See Joint Family (1)
See Mortgage (1)
See Mortgagor (2)

LETTER.

A —— containing an admission does not require a stamp before it can be admitted as evidence ... 325

LIABILITY.

(1) A judgment-creditor or decree-holder releasing his deceased judgment-debtor's representative into whose hands that debtor's assets have come and exempting the property from execution, cannot go against property which only became liable by way of security for the due payment of the debt by the principal debtor ... 19

(2) Whether property seized by a judgment-creditor in the hands of his deceased judgment-debtor's son, is held by the son under such

Page.

LIABILITY.—(*Continued.*)

circumstances as render him liable for his father's debts, is a question which cannot be tried in execution proceedings, but must form the subject of an independent suit ... 265

See Debt (1)
See Nautches (1)
See Ouster (1)
See Surety-bond (1)
See Surplus Proceeds (1)

LIEN.

See Execution (12)

LIMITATION.

(1) In a suit to recover possession of a mouzah where plaintiff alleges that the land was given in *zur-i-peshgee* mortgage to defendant No. 1, who opposes his re-entry after redemption, and it is found that defendant No. 2, who is in possession, is not identical with the mortgagees between whom and defendant No. 2 there is no collusion 17

(2) In respect of a person's right to resume and assess certain land, acquired by purchase from the Government 24

(3) Where, instead of suing out execution against P's estate, as directed in his decree, a decree-holder brings a suit to have it decided who are P's legal representatives; and having obtained a decree in this suit, he applies after three years, for execution of the original one 160

(4) To meet a plea of——, a judgment-debtor is held entitled to a deduction of the time occupied by him in prosecuting his claim in the Civil Court according to the directions of the Collector ... 274

(5) Where an application is made and proceedings taken to enforce or keep in force a decree .. 282

(6) In a suit to set aside an adoption where a father dies before adoption takes place 285

(7) In a suit for possession against a mirasdar who pleads—— ... 331

(8) As applied to the title of a person to uncultivated or jungle land, where adverse possession for a sufficiently long time is proved ... 368

See Act XIV of 1859 (1)
See Act VIII (B. C.) of 1869 (2)
See Act IX of 1871 (1)
See Alluvion (2)
See Amendment of Decree (1)
See Certificate (1)
See Execution (3) (14)

Digitized by Google

Page.

LIMITATION.—*(Continued.)*

See Hindoo Law (8)
See Limitation (7)
See Notice (3)
See Privy Council Rulings (4)

M

MAHOMEDAN LAW.

See Privy Council Rulings (9)

MAINTENANCE.

(1) A party entitled to —— out of an estate may claim to have a charge for such —— upon the estate into whosesoever hands the property may go 33

(2) A prospective right of —— cannot be attached, and a contingency of this kind is not included in Act VIII of 1859 s. 205 as something capable of attachment 427

MANAGER.

Where in a suit by G as —— of the Bettyah Raj and trustee of the son of Maharaja Rajender, against an official for an account of various expenditures, &c., the defendant pleads that, as the Koer is come of age, and the certificate given to G as guardian has become inoperative, G has no right to sue, HELD that G's only *locus standi* is as one of the members of a committee of guardianship and mangement appointed by Maharaja Rajender, which provided that all affairs should be conducted according to the decision of the majority of the committee, and that having no authority from either of the two other members to bring the suit, he cannot maintain it 242

See Act VIII of 1859 (4)

MARRIAGE.

The presumption from co-habitation which arises in favor of the validity of a ——, is excluded where the alleged wife is of a different caste from the husband: and unless sanctioned by custom, such a —— is not legally binding 334

MESNE PROFITS.

(1) In estimating ——, the Lower Courts should not decide on the supposed personal experience of the Judges, but on the evidence laid before them. Principle on which —— are to be estimated, stated 15

(2) —— defined 108

Page.

MESNE PROFITS.—*(Continued.)*

(3) Where intermediate holders combine wrongfully to keep an auction-purchaser out of possession, they must all be held liable for —— 226

(4) Where the Privy Council made an order in favor of a plaintiff, decreeing possession of certain property with ——, HELD that the intention was to award such a sum as would compensate the plaintiff for his actual loss, and the decree therefore authorized the Courts of this country to consider and deal with the question of —— as fully as a Court could, which was charged with the duty of originally determining the merits of such a question between the parties to the suit. The High Court accordingly awarded the amount of actual loss found to have been incurred in respect of each year with interest thereon from each year to the date of the High Court's order ... 449

See Co-sharer (1)
See Execution (19)
See Remand (2)

MINOR.

(1) A —— cannot be bound by an Ameen's inquiry during which he was not properly represented ... 342

(2) It is not optional with a —— to sue either in his own name, or through the intervention of a guardian: he must be represented by a legally constituted guardian 395

See Act IV (B.C.) of 1870 (1)
See Act IX of 1871 (3)
See Jurisdiction (11)
See Legal Necessity (1)
See Onus Probandi (7)
See Partition (1) (2)

MISAPPROPRIATION.

See Cause of Action (2)

MISJOINDER.

See Dispossession (1)

MOKURRUREE.

See Privy Council Rulings (5)

MONEY-DECREE.

See Execution (12)
See Jurisdiction (3)
See Mortgage Bond (1)

MORTGAGE.

(1) The legal representative of a mortgagor is entitled to redeem the mortgaged property, and to a notice of foreclosure 25

Digitized by Google

Page.

MORTGAGE.—(*Continued.*)

(2) Defendant No. 1 borrows money from plaintiff on a bond, hypothecating property by way of simple mortgage. He then executes a similar instrument in favor of defendant No. 2 on a further loan, and subsequently executes a second bond in favor of plaintiff for the amount (principal and interest) due under the first bond. Plaintiff obtains a decree against the defendant No. 1 for the money due under the second bond, and sometime after, defendant No. 2 also obtains a decree upon his bond. The property is sold in execution of plaintiff's decree, and purchased by decree-holder, after which, defendant No. 2 executes his decree and attaches the property which, notwithstanding plaintiff's objection, is sold and purchased by defendant No. 2, who obtains possession. Plaintiff sues to have the sale to the latter set aside and his own purchase upheld:

HELD that plaintiff on purchasing at the sale in execution, took, subject to the defendant's security, to this extent that the defendant by paying off the prior debt might establish his own security.

HELD that the question whether plaintiff's first security was extinguished by his taking a second security, covering the original debt with interest, would depend on the intention of the parties, which, in this case, was shown by the original bond having remained in the possession of the creditor... 338

See Decree (11)

See Onus Probandi (1)

MORTGAGE BOND.

When a creditor who holds a bond whereby property is mortgaged, elects to take a money decree, and in execution thereof brings the mortgaged property to sale, he by that sale transfers to the purchaser the benefit of his own lien and also the right of redemption of his debtor. When, therefore, the decree-holder is himself the auction-purchaser, he obtains the right to have his lien on the mortgaged land satisfied ... 460

MORTGAGED PROPERTY.

A party purchasing —— after a suit has been instituted to enforce the mortgage takes nothing as against the mortgagee, or as against one who claims under a decree which directs the sale of the property in satisfaction of the mortgage, even though the deed of sale is registered, and the mortgage was not registered ... 382

MORTGAGES.

Where a —— having elected to sue a mortgagor instead of selling the mortgaged property, obtains a decree without costs in the Appellate, and the first Court in a further suit on default as to instalments gives him a decree without costs, HELD that the first Court could only follow the rule as to costs laid down by the Appellate Court; but that on the defendant's defaulting again, it would do well to consider all the circumstances 84

See Mortgage (2)

See Privy Council Rulings (5)

MORTGAGOR.

A —— 's legal representative is the person who, by law or contract, succeeds the —— in his position relative to the mortgagee in respect of the property; and such a succession may occur either by the death of the ——, or by assignment of the equity of redemption 25

MUNICIPAL CORPORATION.

A suit against the —— of Howrah for the value of goods sold and damages in consequence of attachment and sale of plaintiff's moveable property under a prosecution under Act III (B.C.) of 1864 s. 67 is not maintainable ... 222

N

NAUTCHES.

Attending —— and occasionally giving —— at one's own expense, cannot be considered immorality on the part of a father absolving a son from obligation to pay his debts 260

NEUMPUTRO.

See Partition (3) (4)

NEW CASE.

See Appellate Court (3)

Digitized by Google

Page.

NOTICE.

(1) A purchaser of the mortgagor's interest whether he is in possession or not, is entitled to —— of foreclosure except where any alienation has been prohibited by contract between the mortgagor and mortgagee; and a——of foreclosure does not bind any purchaser who has not been served with it 96

(2) To be reasonable, a——to quit, given by a landlord to a tenant, must fix a time within which the ryot is required to quit the land... 271

(3) When a——is issued, a new period of limitation begins to run ... 327

See Ejectment (2)
See Enhancement (1)
See Execution (11)
See Land-lord and Tenant (5)

O.

OBJECTION.

Where no —— is taken before the first Court to an account which is there prepared as agreed to by both parties, it cannot be taken in the Appellate Court 251

See Execution (6)

ONUS PROBANDI.

(1) In a suit for possession where plaintiff sets up a late purchase against a defendant whose title is derived from a sale in execution of a decree made on a mortgage-bond and alleges that the earlier transaction was fraudulent 56

(2) In a suit to have a purchase at an execution-sale set aside on the ground that it was not *bonâ fide*... 141

(3) In a suit for arrears of rent and for ejectment in consequence of non-payment where defendant challenges the rate claimed as well as plaintiff's right to sue alone ... 289

(4) In a suit for khas possession against a lessee who sets up a title to defeat plaintiff's admitted right as zemindar 291

(5) In a suit by a member of a joint Hindoo family to recover possession of a share of the ancestral property, where limitation is pleaded 381

(6) Where the purchaser of an estate at a sale for arrears of revenue, after withdrawing a suit for arears of rent, sues to eject the defendant from a piece of land on which his homestead was, *i.e.*, to declare the land liable to assessment and to obtain khas possession... 388

Page.

ONUS PROBANDI —*(Continued.)*

(7) A defendant who pleads plaintiff's minority as a bar to the suit, is bound to substantiate the plea ... 395

(8) In a suit to recover possession of an ousut talook on the allegation of having been dispossessed by the purchaser of the zemindaree right 431

See Decree (10)
See Hindoo Law (2)
See Privy Council Rulings (5) (17)
See Right of Occupancy (6)
See Special Appeal (8)

ORIGINAL JURISDICTION.

(1) Where appellant fails to deliver the paper books and is not represented by Council at the appeal, and the respondent, though he has the option, does not deliver the paper-books, the Court dismisses the appeal without costs, although the respondent appears at the hearing by Counsel 136

(2) A case should not be sent to the High Court under Act XXVI of 1864 ss. 7 and 8 until the party against whom judgment is given has given the security there mentioned, and the Small Cause Court before sending the case should see that the security is given.

Where, after examination of a sample of certain goods contracted for, it is agreed by both parties that the goods should be taken at a rate less than the contract rate, the parties cannot after that raise the question whether there has been a breach of contract, and ask for damages by reason of the goods not being of the quality contracted for ... ... *ib.*

(3) Where a purchaser engages to take delivery of cargo from a ship at a certain rate per diem, and in the event of failure to pay demurrage, the terms of the stipulation in the contract, construed .. 139

(4) Where a broker agrees to give up an admitted claim to brokerage on 2,000 corahs previously disposed of in consideration of defendant, a commission agent, employing him to sell a like quantity of corahs and all his other goods for the future, employing plaintiff alone as his broker, and where it is also agreed that, if defendant does not sell the second batch of corahs through plaintiff, the brokerage on the whole will be payable by defendant, HELD that the agreement is not void either as being in restraint of trade or for uncertainty 146

Digitized by Google

Page.

OUSTER.

In the absence of any express agreement to the contrary, a landlord is under the implied obligation to indemnify his tenant against —— or disturbance of possession by his own act, or by the acts of those who claim under him, or have a right paramount to his, but not against the wrongful acts of third parties 121

P.

PAPER BOOK.

(1) The petitioner in a regular appeal to the High Court should not be called upon to deposit the costs of translating, &c., any papers of which he has not furnished a list with a view to their inclusion in the ——. What papers a party requires, or ought to print, is a matter which he or his vakeel must, in the first instance, determine; the Deputy Registrar preparing his estimate and demanding payment according to the requirements made on him ... 458

(2) If the petitioner in a regular appeal to the High Court does not furnish the Deputy Registrar with a list of papers which he desires to have prepared and placed in the ——, that officer ought not to serve him with an estimate of the cost of printing, &c. ... 459

PARTITION.

(1) A —— in respect of which no formalities have been observed, and no record preserved, except a list representing the result arrived at, is not in itself obligatory on the minor who has the option of repudiating it when he comes of age or within a reasonable period after that date 68

(2) A minor can only be held to have accepted a —— if he has acted in such a way to the plaintiffs as to lead them naturally to suppose that he has done so 68

(3) Where the father of a joint Hindoo family executes a neumputro, declaring that his four sons are not to divide the property, and it happens that one of his sons predeceases his father without issue, and another leaving two sons not bound by the prohibition, HELD that as these grandsons are parties having interest in the property, conditions which do not and cannot affect them ought not to be held to restrain the other co-sharers 297

(4) *Quære.* Is a provision in a neumputro, prohibiting —— valid, or is it contrary to Hindoo law, *ultra vires* and null and void? ... 297

See Possessory Suit (2)

PENALTY.

See Privy Council Rulings (3)

PENSION.

See Imperial Grant of Land (1)

PETITION.

See Kistbundee (1)

PHULKUR.

See Jurisdiction (9)

PLAINT.

See Privy Council Rulings (16)

PLEADINGS.

Where the appellant's pleader asks to be allowed to withdraw from the appeal before the hearing begins, the respondent's pleader cannot be heard upon cross-objection 229

POSSESSION.

(1) In a suit to set aside a decree where plaintiff seeks to recover —— on the strength of his title, the Court is bound to try the question of title 21

(2) In a suit for ——, which had been lost after enjoyment for more than 12 years, HELD that plaintiff is entitled to recover the property even if unable to establish the kobala under which he claims to have purchased 204

(3) Where the —— of a plaintiff suing for a declaration of title extends over a period of more than 12 years, and the nature of that —— is such that it can be successfully relied upon as a bar to a suit by a stranger to recover ——, a Court of justice is competent to declare his title upon such —— 205

(4) There is no necessary presumption that property in the —— of a respectable female's husband, brother and son respectively, is —— in her behalf, and not on theirs 264

See Ancestral Property (2)
See Co-sharer (1)
See Ejectment (1)
See Onus Probandi (4)
See Privy Council Rulings (15)
See Right of Suit (1)

Digitized by Google

Page.

POSSESSORY SUIT.

(1) The opinion that even if plaintiff's purchase is made on a wrong declaration as to the nature of S's right from whom he purchased, still plaintiff is entitled to possession under whatever legal right S admittedly had, is bad in law 60

(2) In a suit for possession of land which plaintiff's vendor had purchased jointly with those under whom defendants claimed, HELD that it was not necessary for plaintiff to show an actual formal partition: it was enough to show that his vendors, and he himself after them, had in fact, for a considerable time, held their share in a separate form 259

(3) In a suit to recover land on the allegation of wrongful possession, all that plaintiff is required to prove is, that he was peacefully in possession, and was wrongfully dispossessed by defendant ... 291

See Landlord and Tenant (3)
See Onus Probandi (8)
See Right of Suit (2)

POST-NUPTIAL CONTRACT.

(1) ——s are not a mere nullity at law 67

(2) Where a husband stipulates in a —— to do nothing without the permission of his wife on pain of immediate divorce and realization of *den mohur*, and also to pay over to her all the money he may earn 67

PRACTICE.

See Original Jurisdiction (1)

PRESUMPTION.

(1) The fact that defendant holds a pottah of a date subsequent to the permanent settlement, but granted in confirmation of a prior holding, does not rebut the —— arising under Act X of 1859 s. 4 ... 58

(2) The maxim *omnia presumuntur rite esse acta* cannot apply where it is plain that the greatest possible irregularities have occurred 367

See Hindoo Law (2)
See Revenue Suit (1)

PRIVY COUNCIL APPEAL.

(1) Where an appeal has been filed under the Letters Patent, s. 15, against the grant of a certificate to an applicant for permission to appeal to the Privy Council, there is no ground for the contention by the applicant that the six weeks

Page.

PRIVY COUNCIL APPEAL.—*(Continued.)*

prescribed in Act VI of 1874 s. 11 will not begin to run till such appeal is finally disposed of 220

(2) When the Privy Council decrees, not only a certain specified sum as the costs of the appeal to England, but also awards the costs incurred in the Courts in India, the decree-holder is entitled to the costs for translating the record of the appeal and for transmitting it to England 463

PRIVY COUNCIL DECREE.

See Mesne Profits (4)

PRIVY COUNCIL RULINGS.

(1) J, as the executor of his deceased father S, obtained a decree which he held in trust for S's heirs, *viz.*, himself and his brothers. One of the brothers (H) died, leaving J and M his executors. M then sold to J the interest of H's sons for an inadequate consideration:

HELD that, according to the rules of equity, the sale could not stand; but that J was bound to return to H's sons their share in that estate, upon receiving back the purchase-money.

HELD that the sale was equally invalid against any other person for whose benefit the trustee (J) may have purchased secretly in his own name, as it would be against the trustee himself ... 6

(2) Where land which has submerged re-forms, and can be identified as having formed part of a particular estate, the owner of that estate is entitled to it 8

(3) Defendant entered into a bond agreeing to pay a specified rate of interest in instalments on a sum borrowed, and to repay the principal in 12 years; the obligee not being bound to accept payment earlier. A zemindaree was mortgaged as security, and it was provided that, if any obstacles were caused by the defendant in respect of any of the conditions of the bond, the mortgagee would be competent, after two months' notice, to sell the property or portions thereof, and pay himself the principal and the interest thereon for the unexpired portion of the 12 years.

A portion of the interest having come into arrear, plaintiff gave notice of sale; but defendant disputed his right to sell on the alleged

Digitized by Google

Page.

PRIVY COUNCIL RULINGS.—(*Continued.*)

ground as not being an "obstruction" within the bond. The parties not being able to come to a final agreement as to the conditions of sale, plaintiff brought this suit claiming the full amount of the mortgage-money with interest for 12 years. He obtained a decree, which was modified by the High Court, who gave him principal and interest at the stipulated rate:

HELD that the Clause relating to sale was in the nature of a penalty, and plaintiff was not entitled to enforce it only upon default in the payment of interest.

HELD that the suit was not maintainable, either as an action for damages for the amount which plaintiff could have obtained by the sale, or on the bond itself ... 91

(4) The period of 60 years, within which the law allows mortgagors to bring their suit, cannot be diminished by any Court of justice on the ground of the laches of a party in the prosecution of his rights.

Following a previous ruling of the Privy Council (in the case of Radhanath Bose *v.* Gisborne and Co.), it was held that in a suit, founded upon a right to redeem, the defendant, in order to claim the benefit of Act XIV of 1859 s. 5 must show three things: first, that he is the purchaser according to the proper meaning of that term; second, that he is a *bonâ fide* purchaser; and third, that he is a purchaser for valuable consideration 99

(5) In a suit by mortgagees under a zur-i-peshgee mortgage, not only for possession, but also for setting aside a mokurruree lease, which was alleged to have been granted by the mortgagor prior to the mortgage, and under which defendants had been in possession for some time in accordance with a Magistrate's order:

HELD that the onus was on the plaintiffs to give some evidence to impeach the validity of the mokurruree: but this having been done, and a strong *primâ facie* case made out, the onus was shifted, and it became incumbent on the defendants to show that the mokurruree was executed before the zur-i-peshgee, and that it was granted *bonâ fide* for a real consideration, and intended to be operative as between the mortgagor and the lessee 111

(6) The statutory sale of an under-tenure under Regulation VIII of 1819 cannot be set aside, because one of the witnesses to the notice (which was in fact served) turns out not to be substantial.

The High Court's construction of the word "substantial," in s. 8 of the above Regulation, as meaning a wealthy man from whom damages could be recovered by the putneedar in the event of the attestation being false, was held by the Privy Council to be too limited a view; wealth being only one element in the position and status of the witness. If he lived in the neighbourhood, and was a respectable man, and of good character, their Lordships saw no reason why the Judge might not properly come to the conclusion that he was a substantial person 113

(7) The right, given by Act VIII of 1859 s. 15 of obtaining a declaration of title without consequential relief, can be claimed only in those cases where the Court could have granted relief if relief had been prayed for.

A suit instituted by a zemindar against a number of his ryots for a declaration of a mâl title by setting aside, not a deed set up, but an allegation made by the defendants of a bromuttur title, was held to be not maintainable, because relief could not be granted in the shape of merely setting aside an assertion which may have been merely by word of mouth ... 150

(8) Where a Hindoo wife is entitled to an absolute estate in certain property, her husband cannot cut down her interest to a life-interest by any dowl which he may make ... 184

(9) Where a copy of a deed is tendered as evidence, and the party tendering it fails to comply with the conditions required to make the copy statutory proof of the deed, he is at liberty to give other secondary evidence of the contents of the deed, if the non-production of the original has been duly accounted for.

The general principle of the Mahomedan law that a gift is invalid where there is want of acceptance and seisin by the donee, is subject to the exception that

Digitized by Google

Page.

PRIVY COUNCIL RULINGS.—*(Continued.)*

where there is, on the part of a father or other guardian, a *bonâ fide* intention to make a gift, the law will be satisfied without change of possession, and will presume the subsequent holding of the property to be on behalf of the minor.

The rule of Mahomedan law that the gift of *Mushâ*, or an undivided part in property capable of partition, is invalid, does not apply to definite shares in zemindaries which are in their nature separate estates with separate and defined rents.

Where an issue was not raised in the Court of first instance, nor taken in the ground of appeal, it is too late to set it up for the first time in special appeal, specially if the evidence has not been directed to it 208

(10) The Privy Council affirmed the principle of a decision of a Full Bench of the High Court (9 Weekly Reporter, p. 505), which held that, in the case of succession by a reversionary heir after the death of a widow, who takes by inheritance from her husband, and is dispossessed, the period of limitation as against the reversionary heir in the absence of fraud is not to be reckoned from the time when he succeeds to the estate, but from the time at which it would have been reckoned against the widow if she had lived and brought the suit.

According to Hindoo law, the right once vested in a daughter by inheritance does not cease until her death, notwithstanding she become barren, or a widow who has not borne a son. Circumstances of that nature do not destroy a heritable right which has once vested. If two sisters, upon the death of their mother, together constitute their father's heir, then upon the death of one of them, the property which descended to both jointly survives to the other, whose right of survivorship, previously acquired by inheritance, is not destroyed by her disqualification to inherit at that time by reason of her being a childless widow.

An admission of a fact on the pleadings by implication is not an admission for any other purpose than that of the particular issue,

Page.

PRIVY COUNCIL RULINGS.—*(Continued.)*

and is not tantamount to proof of the fact 214

(11) In a suit to set aside two decrees, which declared that certain bond-debts incurred by the shebait of an idol should be realized from the rents or profits of the dewuttur mehal, it was held that the High Court was right in holding that, in the absence of proof of fraud or collusion, it could not re-open and review those judgments. It was held also that the Privy Council, since it was not sitting in appeal to determine whether the conclusions of fact or of law on which those decrees were founded were right or wrong, could properly deal only with the operation and effect of the decrees as they stood.

Notwithstanding that property devoted to religious purposes is, as a general rule of Hindoo law, inalienable, it is competent for the shebait, in his capacity as shebait and manager, to borrow money for the proper expenses of keeping up worship, repairing temples, defending litigation, and other like objects; but the power to incur such debts must be measured by the existing necessity for incurring them. And judgments obtained against a former shebait in respect of debts so incurred are binding upon succeeding shebaits 253

(12) An estate was sold for arrears of revenue under Act XL of 1859, and, after the necessary deductions, the surplus proceeds remained in deposit with the Collector. Of these upwards of Rs. 35,000 was the share of appellant, one of the shareholders, who instituted a suit to set aside the revenue sale, and after some litigation proved successful. An appeal from the decree having been dismissed by the Privy Council on 18th December 1873, the sale was conclusively set aside.

Meantime, one S P S, a judgment-creditor, attached the appellant's interest in the surplus proceeds and sold it in execution for Rs. 8,000 to one J P, agent for respondents. The Rs. 8,000 was drawn out from the Court, and applied in satisfaction of decrees held by S P S and others. Subsequently respondents

Digitized by Google

Page.

PRIVY COUNCIL RULINGS.—*(Continued.)*

applied to the Collector for payment to them, as purchasers under the execution-sale, of the appellant's assumed interest in the surplus proceeds of the revenue sale. But as the revenue-sale had been set aside, the Collector refused the application. Upon which the respondents sued the appellant, the heir of S P S and the other judgment-creditors, for the Rs. 8,000 with interest. The High Court on appeal gave them a decree against the appellant:

HELD that respondents had established no title to recover the sum sued for from appellant.

HELD that the doctrine of Courts of equity that a plaintiff who comes to be relieved from his own act must submit to the equitable conditions which the Court may see fit to impose was inapplicable to the case of the appellant, who was not seeking the aid of the Court, but was himself sued for money paid under no contract or consent of his, but under proceedings taken *in invitum*:

HELD that respondents bought the appellant's interest in the surplus proceeds subject to the contingency of his succeeding in his suit to set aside the revenue-sale, in which event that interest would be *nil*. There is no general equity existing between the parties upon which appellant ought to be compelled to restore to the respondents their original position, because the event on which they speculated has gone against them 305

(13) The Code of Civil Procedure (Act VIII of 1859) s. 15 must be construed upon the principles, and by the light of the decisions of the English Courts of equity upon the 15th and 16th Victoria, cap. 86, s. 50, which is in precisely the same words, and the construction which must be put upon it is that a declaratory decree cannot be made, unless there is a right to consequential relief capable of being had in the same Court, or in certain cases in some other Court.

The mere quieting of doubtful titles is not sufficient reason for a declaratory decree; and it appeared to their Lordships to have been very reasonably ruled in India that the Court will not try questions of title as to future interests where neither claimant has a right to present possession, especially questions of title which may never arise.

A suit by a reversioner to restrain a widow or other Hindoo female from acts of waste, although his interest during her life is future and contingent, must be brought with that object and for that purpose alone, and the question to be discussed would be solely between him and the widow; he could not by bringing such a suit get, as between him and a third party, an adjudication of title which he could not get without it 314

(14) A suit brought to recover rent on account of a dependent talook at an enhanced rate after notice was decreed by the Collector. The case came in appeal before the High Court, who thought that the rent admittedly never having varied, the defendant was protected from enhancement under Act X of 1859 s. 15. Plaintiff appealed to the Privy Council, pleading grounds on which the rent of ryots having rights of occupancy were liable to enhancement under s. 17:

HELD that these grounds were not applicable to a dependent talook created before the decennial settlement: such talooks being protected from enhancement by Reg. VIII of 1793 s. 51 except under the circumstances therein mentioned.

HELD that even a dependent talookdar who, under the provisions of that Section (51), might otherwise be liable to enhancement, was exempted by Act X of 1859 s. 15, if he held his tenure otherwise than under a terminable lease, and at a fixed rent which had not been changed from the time of the permanent settlement.

HELD that, as these conditions were satisfied in the case of this talook, it was protected from enhancement; for, although a decree of the Sudder Court of 1821 had declared that the jumma should be fixed at pergunnah rates, and a decree of 1860 construed the earlier decree as declar-

Digitized by Google

Page.

PRIVY COUNCIL RULINGS.—(*Continued.*)

ing that plaintiff was entitled to enhance, the rent never was assessed at pergunnah rates, and never was enhanced 352

(15) In a suit for possession brought by the holder of a certificate of purchase of property sold at an execution-sale, it is open to the real owner, if in possession (Act VIII of 1859 s. 260 notwithstanding) to show that plaintiff is the apparent owner only (benameedar) and a mere trustee.

Where a man steps in during an auction-sale, and assumes the character of a principal agent, and deposing another, who is really acting as agent, purchases the property, he cannot afterwards be allowed, in equity, to turn round and claim to have purchased not for the principal but for himself, and to obtain a profit out of his purchase 358

(16) A suit was brought by a Hindoo widow to recover her share, as heiress to her husband, in certain family property, of which she claimed a portion in her absolute right, and a portion as one of the joint shebaits of certain idols. Among other properties plaintiff claimed one-fifth share in a talook, not as a debuttur property, but, in right of her husband, as her absolute property. The first Court found that this share was the property of a certain idol, and held that she had not maintained the allegation in her plaint, and even if entitled to it in her right of joint shebait, she could not recover in that capacity, as she had not framed her plaint in that way, and had not sued as shebait. The Privy Council held the High Court to be right in treating this objection as one rather of form than of substance and in giving the relief prayed for.

The defendants having pleaded that certain Government papers, in which plaintiff claimed a share, had been appropriated by a memorandum of agreement, to the service of an idol, and the agreement was substantiated by very strong evidence, and shown to have been acted upon by all the parties for years, the Privy Council held that it could not be set aside as a colorable transaction having no validity, merely

Page.

PRIVY COUNCIL RULINGS.—(*Continued.*)

upon the suggestion that the amount set aside was exorbitant, and that there might possibly have been an intention to defraud widows and others 369

(17) Where the fact of payments by a banking firm is distinctly put in issue, the books of the firm being at most corroborative evidence, the mere general statement of the banker to the effect that his books were correctly kept is not sufficient to discharge the burden of proof that lies upon him; particularly, if he has the means of producing much better evidence.

In a suit to recover monies unaccounted for, where defendants plead payments endorsed on documents, and the endorsements purport to have been signed by the plaintiffs, the formal and regular method of proof is to call on the plaintiffs to admit or deny their signatures, and then to call upon witnesses to state whether they saw the plaintiffs sign or could speak to the handwriting or generally what took place ... 390

(18) A bundhoo or cognate only cannot inherit as long as there is a sapinda or samanodaka in existence.

Quære.—Is the old rule of Hindoo law obsolete, or does it still exist that a daughter may be specially appointed to raise a son, and the son of a daughter so appointed is entitled to succeed in preference to more distant male relatives? 409

(19) As regards the joint property of a Hindoo family, there may be a division of right and interest, which will operate to change the character of the ownership from joint to separate, although it may not be intended at once to perfect it by an actual partition by metes and bounds; and therefore the agreement of a family to divide the proceeds of the joint property among its members in definite shares, with the intention that each should hold his allotted share in severalty, severs the joint interest, and extinguishes the rights springing from united family ownership 412

(20) A suit having been referred by the District Judge to arbitration, the arbitrators made their award, and the Judge passed a decree in conformity therewith. That

Digitized by Google

Page.

PRIVY COUNCIL RULINGS.—*(Continued.)*

decree on appeal was set aside for irregularity, the award having been signed by the arbitrators separately, and ten days not having been allowed for objections; and the case was remanded with a view to these defects being cured. On remand one of the arbitrators in a letter to the Judge tendered resignation, but was induced to withdraw it. The award was then properly signed and, after objections heard, duly adjudicated upon under Act VIII of 1859 ss. 324 & 325. A decree was then passed.

HELD, that no appeal lay from this decision to the High Court, and *á fortiori* none lay to the Privy Council:

HELD, that the arbitrator, who first tendered and then withdrew his resignation, did not formally divest himself of his character of arbitrator, and was therefore not *functus officio* when he signed the award 429

(21) As a general rule, an appellant to Her Majesty in Council cannot hope to succeed upon a pure question of fact as to which the decisions of both Courts below are against him.

A finding by a Civil Court must be taken altogether; a party is not entitled to a decree upon one part of it where the decree would be inconsistent with another part of the same finding, unless he can show that such other part is incorrect.

A party, who is not willing to accept a finding in his favor in a suit, is not in a position to ask for a decree based upon it in the appeal, though he ought to have the benefit of it in some future proceeding 451

PROBATE.

Where an application for —— was unopposed, although a notice in the nature of a citation had been issued to the testator's widow, the Judge is not justified in rejecting the application merely upon internal evidence contained in the will... 103

PROCEDURE.

Parties having the benefit of legal advice ought to be left to manage their own cases. It is the plaintiff's business, where he wants the evidence of a witness, or the citation of a document, to move the Court 83

See Arbitration (1)

PRO-FORMA DEFENDANT.

See Appeal (1)

PROMISE.

Where a promisee refrains from bringing a suit which, but for the —— he may have brought, there is good consideration for the ——; but if at the time of the —— no remedy remained to the promisee by reason of limitation, there is no valid consideration, and the —— cannot be enforced at law ... 62

PUBLIC POLICY.

It is contrary to —— to allow a suit to be maintained by a person, who, having been defeated in a former suit, seeks out from vindictive feelings others who he thinks can establish a claim to the property in dispute, and prevails on them to assign him their supposed rights 165

PURCHASE.

See Possession (2)

PURCHASER.

(1) A party purchasing the right, title and interest of another during the pendency of a suit against that other, is bound by the judgment in that suit 329

(2) When a sale is set aside under Act VIII of 1859 s. 256, the —— should get back the money laid out by him for the benefit of the estate in addition to his purchase-money and interest thereon, and should account to the judgment-debtor for the profits received by him. At the same time it will depend upon the circumstances under which the —— took possession, and the nature of his outlay, whether he ought in equity to be allowed to claim reimbursement of the money expended by him 393

(3) Where a —— *bonâ fide* takes possession of the property, and lays out money thereon, because he thinks that otherwise it will become worse than valueless, HELD that he is entitled to have it made a condition of setting aside the sale that he be repaid so much of the outlay as he can show was

Digitized by Google

Page.

PURCHASER.—*(Continued.)*

beneficial to the estate; he accounting for the rents and profits realized by him 393
See Debt (1)
See Nautches (1)
See Right of Suit (1)

PUTNEE.
See Landlord and Tenant (6)
See Privy Council Rulings (6)

PUTWAREE.
A ——'s wages and allowances are in the nature of illegal cesses, and cannot be recovered in a suit for rent 447

R.

REDEMPTION.
See Privy Council Rulings (4)

RE-FORMATION.
Where it is clearly ascertained by boundary marks and measurements that —— has taken place on the original site of the plaintiff's land, the right of the plaintiff as by —— is held to be preferable to that of the defendants, which rests on accretion 110
See Privy Council Rulings (2)

REGISTRATION.
A kubooleut executed whilst Act XVI of 1864 was in force need not be registered 170
See Conveyance (2)

REGULAR APPEAL.
See Paper-Book (1) (2)

REGULATION VIII OF 1793.
Section 51. *See Privy Council Rulings* (14)

REGULATION XXIV OF 1793.
See Imperial Grant of Land (1)

REGULATION VIII OF 1819.
Section 8. *See Privy Council Rulings* (6)

REGULATION VI OF 1822.
See Act VII of 1868 (3)

REGULATION VII OF 1822.
Where tenants, aymadars, voluntarily sign a jummabundee drawn up under ——, s. 9, specifying the amounts of rent payable by them to the Government farmers with whom the settlement was made, HELD that the tenants are not entitled to a deduction on account of costs of collection 436

REGULATION XI OF 1822.
See Cancellation of Tenure (1)

Page.

REGULATION I OF 1824.
(1) Relation of the Salt Department to lands in permanent estates, worked by the Department, as defined by s. 9 cl. 11 ... 197
(2) Rights of the Government in fuel lands to which the rules in s. 14 relate 197
See Salt Department (1)

RELINQUISHMENT.
See Rent Suit (4)

REMAND.
(1) Where an order of —— under Act VIII of 1859 s. 356 for evidence on one of the points raised is accompanied with a record of the Judge's opinion on the other parts of the case, the opinion so recorded is not a judgment in appeal ... 77
(2) In a suit for possession with wasilat, where the first Court set aside the Ameen's report and awarded mesne profits on the evidence of witnesses, the Lower Appellate Court ought not to depute another Ameen, but should try the question as to wasilat due upon the materials on the record 164
(3) Where the Lower Appellate Court does not state the real questions to be determined, and does not examine the evidence with reference to the issues (which were right issues) laid down by the first Court, the High Court remands the case for re-trial 166
(4) Where the first Court does not give satisfactory grounds for its conclusion on a question of fact on which the case turns, and the Lower Appellate Court pronounces its reasons good without going into the merits, the High Court in special appeal remands the case for a rehearing, and directs the removal of it to the High Court as a regular appeal ... 266
(5) Where a Subordinate Judge's decision in appeal is not a right decision (his orders having been impossible of execution), the District Judge is empowered, under Act VIII of 1859 s. 354, to send the case back, after fixing an issue, for a finding 347
See Commission (1)
See Issue (3)
See Special Appeal (3)

RENT.
(1) In a suit by a landlord to have his tenant's —— fixed, not being strictly a suit under Act VIII (B.C.) for a kubooleut, plaintiff cannot require

Digitized by Google

Page.

RENT.—*(Continued.)*

the defendant to take a lease or acknowledge that he is a tenant of the land for any fixed period... 34

(2) Where a tenant knowing a co-proprietor to have been in possession for a long time, and after distinct notice pays the rent belonging to this sharer to another person who has no title, a suit by that single proprietor for his share is maintainable 53

See Auction-Purchaser (1)
See Landlord and Tenant (2)

RENT SUIT.

(1) A suit by a sharer in a talook against a ryot for an aliquot part of the rent wherein plaintiff makes the co-sharers defendants, because they resisted her right to any share of the rent at all, should be treated as a suit in behalf of all the co-sharers collectively ... 11

(2) The Lower Court is wrong in decreeing a —— in which the defendant pleads a set-off and asks for an account to be taken, on the ground that it cannot go into evidence on a question of set-off, and it is bound to take an account 20

(3) A landlord suing for rent at a certain rate, but failing to prove his claim to more than the defendant admits, is entitled to a decree for the amount admitted to be due... 85

(4) A suit for enhancement of rent is rightly brought against a registered tenant, although the latter has conveyed away his interests in the land, if he has not given a regular notice of relinquishment to the zemindar 102

(5) In a suit for arrears of rent in which an intervenor who is made a defendant claims the land as lakhiraj, HELD that her interest not being in the subject of the suit, the decree would not be prejudicial to her. HELD also that she should not have been made a party, the Appellate Court's judgment so far as it decides the question of title against her, being set aside 168

(6) In a suit for rent where the defendant (ryot) sets up the title of a third person who is not made a party, the decision is not a binding decision in respect of title as between parties having conflicting claims within the meaning of Act VIII (B.C.) of 1869 s. 102 ... 227

Page.

RENT SUIT.—*(Continued.)*

(7) Where previous suits in a Collector's Court for rent having been dismissed in consequence of the defendant's plea that the whole of the estate had been resumed, and that there was no distinct land for which plaintiff was entitled to any separate rent, plaintiff brings a civil suit to establish his right, and obtaining a decree sues for arrears of rent from 1271—1279, but obtains a decree for the rents of three years only, the cause of action for the years previous to 1277 being considered barred, HELD that this decision is right, as there was nothing to prevent the plaintiff from including in the civil suit which he brought, or any previous suit, a claim for rent as well as for declaration of right 281

(8) In a suit for arrears of rent on the basis of a shironamah, where the ryot denies that he executed the document and produces evidence to show that the rates mentioned in it are not correct, HELD that there is no question of right to vary the rent, and the case therefore does not come under Act VIII (B.C.) of 1869 s. 102 ... 343

(9) A —— in which there is no dispute as to the amount of the jumma, and the only question is whether it is to be paid in instalments or in a lump sum, does not involve a question of right to enhance or vary the rent ... 385

(10) In a suit to recover rent by the auction-purchasers of a talook sold for arrears of revenue, where the defendants plead that they held the land under the howladars and had confessed judgment in a former suit for rent by those howladars, and the latter put in a petition of intervention:

HELD that the Lower Appellate Court had no right to go into the question of the validity of the howla as the issue was, who had been in receipt of rent from the ryots? 435

(11) In a suit for rent, where the claim was at the rate fixed by the Revenue Officer acting under Act VI (B.C.) of 1862 s. 10, and was dismissed on the ground that that officer had not the power to assess such rent as he thought proper, HELD that the plaintiff, whose claim was not in the alternative, was not entitled to a decree at the rate previously paid 465

Digitized by Google

Page.

RENT SUIT.—(*Continued.*)
See Act VIII (B.C.) of 1869 (1) (6)
See Charter Act (1)
See Evidence (7)
See Onus Probandi (3)
See Special Appeal (5)

REPAIRS.
See Landlord and Tenant (1)

EPRESENTATIVE.
See Execution (7)

RES JUDICATA.
A suit for khas possession is not a bar to a later suit for rent of the same land 253
See Full Bench Rulings (2)

RESTRAINT OF TRADE.
See Original Jurisdiction (4)

REVENUE SUIT.
As in civil suits, so in —— s, all things must be presumed to have been correctly done, until the contrary is shown 79

REVERSIONER.
See Hindoo Widow (1)
See Privy Council Rulings (10) (13)

REVIEW.
(1) The discovery of new evidence may make it proper to grant a ——; but the circumstances must be very special, the more so when the application to —— is made many years after the date of the decree, and the evidence discovered must be of a clear and conclusive character 323
(2) A —— should be granted only on the discovery of new evidence, or for the correction of some evident (that is, patent and indubitable) error or omission, or some other particular ground of the like description 438
See Amendment of Decree (1)
See Special Appeal (6)

RIGHT OF FISHERY.
See Right of Occupancy (5)

RIGHT OF OCCUPANCY.
(1) Occupancy for 12 years cannot give a —— where the occupation by the occupant alone does not extend to 12 years, nor is it the occupation of land which he has inherited 237
(2) Where a ryot proves possession for upwards of 12 years, the mere fact of his land being khamar does not deprive him of his ——. Before his case can be brought within the exception in Act VIII (B.C.) of 1869 s. 6, it must be shown whether he has held on a lease for a term, or year by year ... 288
(3) A tenant suing to recover possession of an old jote from which he has been dispossessed by his landlord before the termination of his tenancy, is not required to prove a —— 387
(4) Where tenants have obtained a —— under Act VIII (B.C.) of 1869 s. 6, a suit for ejectment against them can only be brought under that Act 411
(5) Where a jotedar has exercised rights of fishery over two julkurs for more than 12 years, not as the owner of the jote (with which the julkurs were not connected), but as a tenant under a landlord, HELD that such possession does not confer upon him a —— ... 432
(6) Before a tenant can oust a landlord by insisting on remaining on his land, he must show that he has acquired by law some right to do so 448
See Tenancy (1)

RIGHT OF SUIT.
(1) Purchasers of property have a good —— when their venders had been in peaceable possession, but were disturbed and dispossessed within the period of limitation ... 163
(2) Alleged purchasers whose venders were not in possession, and who pay nothing for what is said to have been sold to them, are not competent to maintain a suit for possession of the property in dispute 165
See Act IX of 1871 (3)
See Alluvion (1)
See Manager (1)

RIGHT OF WAY.
A party claiming under a contract the re-opening of a way is not required by Act IX of 1871 s. 27 to prove user for 20 years ... 290

S.

SALE.
A tenant by alienating his tenure does not deprive the zemindar of the right to sell it in execution of a decreee for arrears of rent. A zemindar can sell the tenure in the hands of the transferree, not being one of the judgment-debtors,

Digitized by Google

Page.

SALE.—(*Continued.*)

if he does so with reasonable promptness, provided he has not done anything to recognize the transfer 106

See Act VII (B.C) of 1868 (2)

SALE CERTIFICATE.

A Court is not legally competent to make an *ex parte* order amending a —— granted under Act VIII of 1859 s. 259 301

SALT DEPARTMENT.

The rules relating to the —— in Regulation I of 1824 are not to be restricted to the four districts named, but were intended to be enforced wherever lands might be held or required by Government for the manufacture of salt 197

See Regulation I of 1824 (1)

SECURITY.

See Liability (1)

SET-OFF.

See Rent Suit (2)
See Zemindaree and Shikmee (1)

SHAREHOLDER.

See Decree (6)
See Talook (1)

SHEBAIT.

See Privy Council Rulings (11)

SMALL CAUSE COURT.

Where the decisions of the Lower Courts are found, in special appeal, to have been without jurisdiction, and the suit to be cognizable by the ——, the High Court makes an order sending the plaint to the —— for trial, upon the appellant (plaintiff) paying within three months all the costs of the litigation 445

See Act XI of 1865 (1)
See Original Jurisdiction (2) (13)

SOODRA.

See Inheritance (1) (2)

SPECIAL APPEAL.

(1) The fact of the Lower Appellate Court taking additional evidence does not make a —— liable to be heard and determined as a regular appeal 51

(2) Where the first Court and the Lower Appellate Court differ as to questions of fact, it is not open to the parties in a —— to argue whether the former was right or the latter 144

Page.

SPECIAL APPEAL.—(*Continued.*)

(3) Where the Lower Appellate Court's judgment is not based on the whole evidence on the record, it is set aside in ——, and the case is remanded for re-trial ... 160

(4) The construction of the deposition of witnesses is not a question of law, and therefore not a ground of ——. Nor is it a ground of —— that the Court has not passed an opinion on the report of an Ameen. But where an assumption is made by the Court without any evidence, that is an error of law warranting a —— ... 250

(5) In a rent suit where the judgment of the Lower Appellate Court dismissing the plaintiff's appeal on the ground that plaintiff, as only a sharer could not sue separately, shows that a question of title was not even considered, the decree in general terms cannot be held to have determined it. Under Act VIII (B.C.) of 1869 s. 102, therefore, no appeal to the High Court lies in the suit ... 268

(6) Where a District Judge reviews his predecessor's judgment and reverses his decision and the High Court in —— sees no ground on which it can rightly disturb the judgment in question, it sets aside the review and restores the judgment 275

(7) As the High Court in —— cannot go into the evidence, it remands a case with a view to the Subordinate Judge taking such evidence as is necessary to decide the issues, if he considers that the evidence taken by the Moonsiff is not sufficient 322

(8) Where each of the parties has gone into evidence upon the issues raised in the Lower Courts, no question as to whether the onus lies on the one, or on the other, can arise in —— 324

(9) Where the conclusion of the Lower Appellate Court rests not only upon the contents of a document involving the question of its correct construction, but also upon all the facts of the case and the whole conduct of the parties, HELD that it is not open to —— .. 406

(10) The circumstance that a question has been determined at the hearing of the appeal in a rent suit, by which an intervenor may be injuriously affected, will not make the appeal cognizable as a —— unless the decision has involved some title or interest in

Digitized by Google

Page.

SPECIAL APPEAL.—*(Continued.)*

land, of parties having conflicting claims thereto 408

(11) The parties in a —— are entitled to show that there has been an error or defect in procedure in the granting of a review, which has affected the decision of the case on the merits, by producing a different decision from that come to in the first instance 438

See Admission (1)
See Evidence (5)
See Remand (4)
See Small Cause Court (1)
See Will (1)

SPECIFIC PERFORMANCE.

See Declaratory Decree (2)

STAMP.

An instrument acknowledging receipt of a sum of money and providing for the payment of interest at a specified rate per mensem, is held to be an agreement falling within Act XVIII of 1869, Sch. II, Art. 11 403
See Letter (1)

SUCCESSION.

(1) Where lands situate in one district are arbitrarily transferred by Government to another having a different system of law in matters of ——, the owners of those lands cannot be presumed to change their observances with their districts; the presumption being against such change 272

(2) A nephew of the half-blood is excluded from —— by brothers of the whole and half-blood ... 272
See Hindoo Law (2)

SUIT.

A —— commences when the original plaint is filed, and not when the plaint is returned by the plaintiff after amendment ... 447

SURETY-BOND.

Where two parties execute a —— to J, R, and M, owners of certain property, and this property is afterwards transferred to R alone, there happens such an entire change in the nature of the service that the sureties' liability does not continue 90

Page.

SURPLUS PROCEEDS.

A party taking out his own share of —— in deposit in a Collectorate jointly with another who is in possession of a certificate of the Civil Court, is not liable for the money drawn by that other ... 82

SURVEY AWARD.

(1) In a suit to recover possession of certain land where plaintiff alleges possession on occasion of a —— between himself and defendant's predecessors, defendant's admission in a rent suit of plaintiff's title and possession, and defendant's intervention in a suit for a kubooleut against the ryots, HELD that the —— is evidence *quantum valeat* of the fact of possession, that defendant's alleged admission is an important part of plaintiff's case, and that plaintiff's cause of action is defendant's intervention in the rent suit 27

(2) Act XIII of 1848 operates in certain cases to give to a —— the full effect of a decree of a Civil Court by taking away from the Courts the power of entertaining any suit for contesting the justice of such award after a limited time 173

T.

TALOOK.

A zemindar by becoming a shareholder in a —— does not lose his right to the joint responsibility of all the other shareholders for the due payment of the rent: he only becomes bound to make in his claim for rent a just and equitable allowance for that portion of it which he, as a shareholder in the talook, ought to contribute 152

TENANCY.

A tenant in possession deriving his right from the zemindar, cannot be ousted by a prior tenant, unless the latter can show that the zemindar could not give the former leave to occupy the land, and that he himself has a right of some superior nature which controls the zemindar's power 59

TENANT-AT-WILL.

See Ejectment (6)

THIRD PARTY.

See Execution (16)

Digitized by Google

Page.

TITLE.

See Declaratory Decree (3)
See Onus Probandi (4)
See Possession (2) (3)
See Rent Suit (6)

TRANSFER OF TENURE.

Where a zemindar makes a transferree a party to a suit for rent and accepts a decree against him jointly with other persons, he has recognized the transferree as a tenant, although the latter's name may not have been entered as such in the zemindar's books ... 106

TRANSLATION.

See Paper-Book (1)

TRUST PROPERTY.

Where a trust is created under a will for certain purposes mentioned in the will, the properties belonging to the trust cannot be taken charge of by the Collector under Act XL of 1858 ... 278

TRUSTEE.

See Privy Council Rulings (1)

U.

UNCERTAINTY.

See Original Jurisdiction (4)

UNDER-TENURE.

Where an ijaradar under one zemindar (A) has also some land under another zemindar (B), his possession of A's land cannot afterwards be pleaded as adverse to A, unless it was brought to A's notice that there was a claim of adverse possession, and that the ijaradar was holding adversely to him under some one else ... 93

See Landlord and Tenant (3)

UNSTAMPED DOCUMENTS.

A document once received without objection should not be rejected on appeal because it is not stamped, when the irregularity does not affect the merits of the case ... 170

USAGE.

By Hindoo law, a well-defined —— acquires the force of law ... 131

USER.

In a suit to establish a right of way, it is not sufficient for a plaintiff to prove —— for twenty years, which ended more than two years next before the institution of the suit; he must show exercise of the right by actual —— within such period of two years 401

Page.

USER.—*(Continued.)*

USUFRUCTUARY MORTGAGE.

Where in a suit for possession under a —— plaintiff obtains a decree giving him possession, but requiring him to restore the property after satisfaction of his claim, HELD that he must certify the amounts received and outstanding, and that the Court executing the decree is bound to require from him, from time to time, a statement of the amount received, and to deal with the matter under Act XXIII of 1861 s. 11 156

W.

WAIVER.

A landlord who refuses to accept rent in kind when it is offered to him, on the ground that he is suing for a money rent cannot, on the dismissal of his suit, come into Court again and sue his tenant for the value of what he refused when it was proffered ... 368

WASTE.

A mutwalee guilty of —— is ordered by the High Court to file in Court every six months a true and complete account of his income, expenditure, and dealings with the property belonging to the endowment 150

WILL.

(1) Where in a suit to recover certain property, both the Lower Courts find that it was left to defendants by way of gift, and the plaintiffs object that under the Hindoo Wills Act, a verbal —— of this kind is not legal, HELD that the plaintiff cannot now throw the defendant's case on a technical ground that the alleged gift was really a —— 230

(2) Before a copy of a —— is admissible as evidence, the Court should call upon the party in whose possession the —— is to file the original 241

See Probate (1)

WITNESS.

Even where the ——es to a deed of sale are alive, their testimony is not the only evidence by which it can be established 293

Digitized by Google

Page.

WUQF.

See Endowment (2)

Z.

ZEMINDAR.

See Talook (1)

ZEMINDAREE AND SHIKMEE.

Where plaintiffs, as being entitled collectively to a 11-anna share of the jumma of a talook, and alleging that they had obtained such portion of their share as the 14-anna talookdars were liable for, sued the 2-anna sharer for what he ought to have contributed; and where the Lower Appellate Court finding that the defendant had a 2-anna share in the zemindaree as well as in the shikmee, considered that the one right must be set-off against the other, and that the plaintiffs had consequently no claim against the defendant 134

ZUR-I-PESHGEE MORTGAGE.

See Limitation (1)

Digitized by Google

TABLE OF CASES.

CIVIL RULINGS.

Page.

A.

Abdool Gunnee v. Janoo Bibee 80
Abdool Hye v. J. Macrae 1
Abdool Hye v. Mitterjeet Singh... ... 348
Abdoor Ruhman v. Baboo Gunesh Lall .. 444
Ajoodhya Doss v. Muthoora Doss ... 14
Akbur Hossein v. Toolsee Ram 17
Alimooddeen v. Wuzeer Ali 52
Ameer Beparee v. Hurree Mohun Kurmokar 87
Anonymous 223
Anund Chunder Mudduck v. Rash Beharee Dey 59
Anundomoyee Dossee v. Rajcoomar Roy ... 34
Annnto Ram Mookhopadhya v. Thakoor Doss Bundopadhya 34
Aruth Soar v. Juggunnath Mohapattur ... 460
Asgur Ali v. Nugendro Chunder Ghose ... 463
Asgur Beparee v. Hurree Mohun Mozoomdar 56
Asman Singh v. Shaikh Obeedooddeen ... 460
Aumirtolall Bose v. Rajoneekant Mitter ... 214
Azim Ali Khan v. Surusutty Debia .. 93

B.

Beer Chunder Manick Bahadoor v. Ram Kishen Shaw 128
Beharee Sahoo v. Puryag Mahtoon ... 291
Betts v. Jamie Shaikh 271
Bhanoomutty Chowdhrain v. Prem Chand Neogy 96
Bhoobun Moyee Dossee v. Umbica Churn Sett 343
Bhugwan Doss v. Sheo Narain Singh ... 253
Bhugwan Doss v. Tekait Than Narain Deo. 309
Bhurut Pandey v. Mussamut Muthora Kooer 421
Bishonath Dey Roy v. Chunder Mohun Dutt Biswas 165
Bissamber Banerjee v. Koylass Chunder Bose 388
Bisto Pershad Chuckerbutty v. Ishan Chunder Roy 57
Booboo Pyaroo Tuhobildarinee v. Syud Nazir Hossein 183
Bool Chand Jha v. Luthoo Moodee ... 387
Brijo Kishore Bhuttacharjee v. Ooma Soonduree Debia 37

Page.

Brijsoondur Roy v. Bibee Kaimoonnissa ... 63
Brojokanth Chuckerbutty v. Banee Madhub Dischit 434
Buboria Ahun Basee Kooer v. Joobraj Singh 225
Buddun Chunder Shaha v. Bepin Beharee Roy 110
Budree Lall v. Kantee Lall 260
Bulobhuddur Mahantee v. Mudhoosoodun Pandey 433
Buloram Baboo v. Issur Chunder Baboo ... 77
Bungshee Dhur Mahata v. Mudhoo Soodun Chowdhry 406
Buroda Churn Bose v. Ajoodhya Ram Khan 286
Buroda Kant Bhattacharjee v. Pearee Mohun Mookerjee 57
Burodakant Roy v. Chunder Coomar Roy... 286
Buskin v. Ramkissen Seal 140

C.

Cheyt Narain Singh v. Bunwaree Singh ... 395
Chowdhry Kripasindhoo Doss v. Radha Churn Doss 234
Chowdhry Mahomed Zuhoorul Huq v. Mahomed Yakoob 367
Chundee Roy v. Isree Pershad Narain Singh Bahadoor 274
Chunder Chowdhry v. Mr. Macnaghten ... 386
Chunder Monee Dassee v. Issur Chunder Ghose 98
Chunder Monee Dossee v. Modhoo Dey ... 166
Chunder Nath Shaha v. Shaikh Noorah ... 292
Cochrane v. Maharanee Brojo Soonduree Debia 310
Collector of Moorshedabad v. Dhunput Singh Bahadoor 83
Coomar Puresh Narain Roy v. R. Watson & Co. 229
Crowdy (Mr. L. G.) v. Ram Bhurosee Chowdhry 383
Crowdy (Mr. W. S.) v. Jhukree Dhanook.. 387

D.

Daitari Mohanti v. Jugo Bundhoo Mohanti 293
Darbaree Sayal v Fatu Dhalee 285
Debee Doss v. Grish Chunder Bagchee ... 196
Debee Doss v. Lullit Mohun Shah Chowdhry 195

Digitized by Google

Page.

Delrus Banoo Begum v. Kazee Abdoor Ruhman 453
Delrus Banoo Begum v. Nawab Syud Asgur Ali Khan 453
Dhonendro Chunder Mookerjee v. Mutty Lall Mookerjee 6
Dhun Monee Chowdrain v. Golam Kasem... 331
Dhun Monee Chowdhrain v. Wooma Churn Roy 445
Dinobundoo Roy v. Dona Churn Chowdhry 53
Dinonath Bose v. Girish Chunder Bundopadhya 435
Donzelle, Mrs. v. Girdharee Singh ... 121
Doorga Churn Chatterjee v. Goluck Chunder Biswas 228
Doorga Doss Sandyal v. Punchoo Ram Mundul 271
Doorga Narain Bose v. Brojo Kishore Ghose 172
Dwarkanath Bose v. Ram Lochun Bose ... 465

E.

Eâd Ali Khan v. Wabed Ali Khan ... 25

F.

Faez Buksh Chowdhry v. Sadut Ali Khan.. 282
Fergusson v. Nil Komul Lahiree ... 270
Ferrier (Mrs. A.) v. Ram Kalpa Ghose ... 403
Fornaro v. Sookdeb 136
Funeendro Deb Roy Kut v. Jogendro Deb 220

G.

Gatha Ram Mistree v. Moohita Kochin Atteah Domoonee 179
Gibbon v. Bukhtar Tewaree 242
Gillanders, Arbuthnot & Co. v. Obhoy Churn Nundy 139
Gobind Chunder Bagchee v. Doorga Monee Debia 270
Gobind Chunder Mojoomdar v. Dulmeer Khan 125
Gobind Coomar Chowdhry v. Manson ... 152
Gobind Pershad Talookdar v. Mohesh Chunder Surmah Ghuttuck 117
Gobind Sookool v. Gokool Bhukut ... 304
Goburdhun Bysack v. Sonatun Bysack ... 84
Gocoolanund Doss v. Musst. Ooma Daye ... 340
Golam Russool Khan v. Kishen Mohun Shaha 156
Goluck Chunder v. Ram Huree 104
Goluck Chunder Sircar v. Ishan Chunder Deb 437
Goluck Kristo Sen Moonshee v. M. David 443
Gopal Singh Moorah v. Sunkuree Paharin... 458
Gopee Bundhoo Shantra Mohapattur v. Kalee Pudo Banerjee 338
Gopee Chand Setai v. Bhoobun Mohun Sen 401
Gopee Nath Ghose v. Kedar Nath Chuckerbutty 426
Gopeenath Naik v. Jadoo Ghose ... 42
Gowhur Ali Khan v. Joy Mungul Singh ... 164
Goya Pershad Aubustee v. Tarinee Kant Lahoree 149

Page.

Gujendro Narain Roy v. The Collector of Midnapore 197
Gunga Dhur Kur v. Roop Chand Kooer ... 82
Gunga Huree Nundee v. Raghub Ram Nundee 131
Gunga Purshad v. Inderjit Singh ... 390

H.

Haran Chunder Ghose v. Dinobundhoo Bose 187
Heera Lall Ghose v. Kalee Doss Mookerjee 65
Heera Lall Ghose v. Ram Taruck Dey ... 325
Hem Chunder Ghose v. Radha Pershad Paleet 440
Hills v. Clerk... 63
Himmut Ali Khadim v. Nyamutoollah Khadim 250
Hulodhur Sen v. Seetul Chunder Bhoomick 85
Hunooman Singh v. L. Crowdy 428
Hur Chunder Ghose v. Wooma Soonduree Dossee 170
Hur Narain Singh Baboo v. Keshub Lall Sett Tulwar 384
Huree Kishore Roy v. Hur Kishore Adhikaree 134
Huree Mohun Mojoomdar v. Asgur Beharee 324
Hureehur Mookerjee v. Raj Kishen Mookerjee 236; 251
Hurosoondery Dossee v. Cally Puddo Dutt 136
Hurro Nath Roy v. Gobind Chunder Dutt 352
Hursuhai Singh v. Lootf Ali Khan ... 8

J.

Jeebun Kristo Gossamee v. Romanath Gossamee 297
Jhotee Singh v. Gopal Singh 457
Jowadunissa Satudai Khandan v. Jhaman Lall Misser 158
Judoo Nath Dey v. Girija Bhoosun Mitter 446
Juggernath Sahoo v. Shah Mahomed Hossein 99
Juggut Chunder v. Banee Madhub Banerjee 205
Juggut Chunder Chowdhry v. Bhurut Chunder Chowdhry 237
Juggut Chunder Chowdhry v. Issur Chunder Fotadar 60
Jugodumba Debia v. Rohinee Debia ... 422
Juhooree Lall Shahoo v. H. Dear ... 399

K.

Kader Nath Biswas v. Huro Pershad Roy Chowdhry 207
Kala Bibee v. The Collector of Chittagong 360
Kalai Haldar v. Shaikh Kyamaddi ... 417
Kalee Narain Singh Burooa v. Chunder Narain Bukshee 228
Kalee Sunkur Sannyal v. Devendro Nath Sannyal 68
Kallaram Dhur v. Joogul Kishore Surmah.. 290

Digitized by Google

Page.

Kartick Nath Panday v. Nundeput Mahatab Bahadoor 263
Kasbee Chunder Dey v. Bungshee Buddun Dey 89
Kashee Kishore Chowdhry v. Bama Soonduree Chowdhrain 27
Kashee Ram Doss v. Moharanee Sham Mohinee 227
Kateeram Dokanee v. Mussamut Gendhenee 178
Kattayanee Debia v. Grish Chunder Banerjee 168
Kedar Nath Chuckerbutty v. Gopee Nath Ghose 426
Kefaetoollah v. Ariza Bibee 264
Khajah Ahsanoolah v. Jusoda 79
Kherode Chunder Roy v. Gordon ... 237
Khowaz Ram Bux Singh v. Bishendharee Geer 402
Kishen Pershad Roy v. Shaikh Enait Hossein 161
Kishen Pershad Singh v. L. G. Crowdy ... 15
Koer Poresh Narain Roy v. Robert Watson & Co. 451
Koomaree Debia v. Luchmeeput Singh Bahadoor 33
Koosoom Kaminee Debee v. Chunder Kant Mookerjee 346
Kristo Chunder Acharjee v. Kashee Thakooranee 340
Kristo Chunder Burmo Surmah v. Mohes Chunder Burmo Surmah 381
Kristo Chunder Mookerjee v. Chundee Pershad Banerjee 252
Kristo Gobind Kur v. Gunga Pershad Surma 266
Kureem Shaikh v. Mokhoda Soonduree Dassee 268

L.

Lall Beharee Awustee v. Bholanath Dey Chakladar 48
Lalla Bhoop Narain v. Mussamut Nawab Abassee Begum 458
Lalla Rooder Pershad v. Hur Pershad Doss 193
Lalunmonee v. Ajoodhya Ram Khan ... 61
Lokhee Narain Roy Chowdhry v. Kally Puddo Bandopadhya 358
Luchmeeput Singh Bahadoor v. Raj Coomaree Dabee 275
Luchmun Prithee Mundul v. Kooer Sree Nundun Singh 383
Lukhee Monee Dossee v. Bhoobun Mohun Bose 147

M.

Mackintosh v. Lall Chand Malee ... 332
Maharajah Joymungul Singh Bahadoor v. Mohun Ram Murwaree 429
Maharajah Ram Kissen Singh v. Rajah Sheonundun Singh 412
Mahomed Kamil v. Abdool Luteef ... 51
Mahomed Khuleel v. Mussamut Sona Kooer 123

Page.

Manson v. Gobind Coomar Chowdhry ... 152
Mengur Munder v. Huree Mohun Thakoor 447
Mitterjeet Singh v. Radha Pershad Singh.. 368
Modhoo Soodun Singh v. Mokundu Lall Shahoo 373
Mofizoodden v. Shaikh Amooddeen ... 58
Mohesh Chunder Roy v. Chunder Mohun Roy 78
Mohima Chunder Roy v. Durga Monee ... 184
Mohima Chunder Roy Chowdhry v. Ram Kishore Acharjee Chowdhry 174
Mohun Lall Shaha v. Joy Narain Shaha Chowdhry 105
Mohunt Narain Geer v. Gour Surun Doss 368
Mokhoda Soonduree Dassee v. Kureem Shaikh 11
Mokund Mooraree Biswas v. Wooma Churn Mookerjee 173
Monesser Doss v. Maharajah Kishen Protab Shahee 427
Monohur Doss v. Seetul Pershad ... 418
Monohur Doss v. Situl Pershad 325
Moonshee Jowad Hossein v. Mohabee Sahee 411
Morgan (E. L.) v. Moulvie Abdool Hye ... 393
Motee Lall Bose v. The Howrah Municipality 222
Mrino Moyee Debia v. Bhoobun Moyee Debia 42
Muddun Gopal Lall v. Mussamut Gowrunbutty 365
Muddun Mohun Singh v. Kanaye Dass Chuckerbutty 21
Munsooroodden v. Mahomed Sufdar ... 259
Mussamut Ackjoo Bibee v. Lalla Ram Chunder Lall Sahai 400
Mussamut Ajhola Kooeree v. Digambur Singh 206
Mussamut Ameeroonnissa Khatoon v. Mussamut Abedoonnissa Khatoon... ... 208
Mussamut Bhogobutty Koonwar v. Mussamut Anuragee Koonwar 459
Mussamut Bibee Budlun v. Syud Fuzloor Ruhman 449
Mussamut Bibee Fusseebun v. Mussamut Ashrufoonnissa 463
Mussamut Dhuno v. Moulvie Ameeroodeen 24
Mussamut Poonoo Bibee v. Moulvie Facz Buksh 66
Mussamut Poonheet Kooer v. Kishen Kishore Narain Singh 419
Muthoora Mohun Roy Chowdhry v. Pearee Mohun Shaha 344

N.

Nagore Monee Debia v. Smith 291
Narain Dhara v. Rakhal Gaen 334
Nicholl v. Tarinee Churn Bose 289
Nilmoney Singh Deo Bahadoor v. Kally Churn Bhuttacharjee 150
Nistarinee v. Kalipershad Doss Chowdhry... 431
Nistarinee Debee v. The Collector of 24-Pergunnahs 330
Nitressur Singh v. Jhotee Tely 343

Digitized by Google

Page.

Nittyanund Gossain v. Shama Churn Chatterjee 163
Nobin Chunder Roy Chowdhry v. Anungo Munjuree Debia 83
Nobin Mohun Nundee v. Ram Taruk Bural 204
Nubocoomar Ghose v. Oozir Shikdar ... 238
Nund Coomar Bhuggut v. Lukhee Pria Debia 36
Nund Coomar Foutehdar v. Bunso Gopal Sahoy 342
Nundeeput Mahatoon Bahadoor v. W. Stewart 20

O.

Obhoy Churn Roy Chowdhry v. Nobin Chunder Roy Chowdhry 95
Obhoya Churn Simlye v. Mohesh Chunder Doss 22
Omesh Chunder Mundul v. Thakoor Dass Mookerjee 345
Ootum Singh v. Ram Surun Lall ... 287

P.

Parbutty Churn Doss v. Protap Chunder Sen 275
Pearee Mohun Mitter v. Mohendro Narian Singh 465
Pearee Mohun Mookerjee v. Koylas Chunder Byragee 58
Pearee Soonduree Debia v. Bhubo Soonderee Debia 31
Peari Mohun Mookhopadhya v. Madub Chunder Baboo 385
Peter v. Vardon 62
Poorno Chunder Roy v. Kristo Chunder Singh 171
Prithee Singh v. The Court of Wards ... 272
Prosunno Coomar Pal v. Chunder Coomar Roy 241
Prosunno Kumari Debya v. Golab Chand Baboo 253
Prosunno Moyee v. Wooma Churn Deb ... 141
Puluck Dharee Roy v. Mahabeer Singh ... 382
Pureshnath Ghose Mundul v. Kristo Lall Dutt 50

R.

Rabia Khanum v. J. P. Wise 329
Radha Bullubh Chuckerbutty v. Banee Madhub Chuckerbutty 230
Radha Kristo Dutt v. Gunga Narain Chatterjee 328
Radha Mohun Mundul v. Jadoomonee Dossee 369
Raj Kishen Mookerjee v. Sreenath Dutt ... 408
Raj Lukhee Dassee v. Pearun Bibee ... 82
Raja Ram Banerjee v. Sonatun Roy .. 404
Rajah Nilmonee Singh Deo v. Heera Lall Chowdhry 442
Rajessuree Debia v. Jogendro Nath Roy ... 278
Rajkristo Banerjee v. Bama Soonduree Dassee 296

Page.

Rajkristo Mookerjee v. Issur Chunder Mookeerjee 90
Rakhal Monee Dossee v. Brojendro Gopal Roy 303
Ramanoogro Singh v. Kishen Kishore Singh 265
Ram Bhunjun Singh v. Mussamut Munder Koer 127
Ram Chand Chuckerbutty v. Nuddiar Chand Ghose 230
Ram Chunder Singh Ghatwal v. Rajah Mahomed Jowhuruzuma Khan ... 376
Ramchunder Surmah v. Ram Chunder Pal 226
Ram Doolal Sen v. Radha Nath Sen ... 167
Ram Doss Lushkur v. Hureehur Mookerjee 86
Ramkishore Acharjee Chowdhry v. Krishno Monee Debia 106
Ram Narain Manjhee v. Mussamut Futema Sogra 399
Ram Narian Roy v. Nil Monee Adhikaree 169
Ram Narain Singh v. Ramoon Paurey ... 76
Ram Nursingh Chuckerbutty v. Dwarkanath Gangooly 10
Ram Runjun Chuckerbutty v. Jowhurujumah Khan 129
Ram Sabuk Bose v. Monmohini Dossee ... 113
Ram Sahoy Singh v. Chet Narain Singh ... 160
Ram Tuhul Singh v. Bisseswar Lall Sahoo 305
Ranee Lalunmonee v. Rajah Ajoodhya Ram Khan 61
Rash Munjoree Chowdhrain v. Radha Soonduree Dossee 283
Rassam, Mrs., v. Donzelle, Mrs.... ... 121
Rohinee Debia v. Degamber Chatterjee ... 422
Roop Chand Bhukut v. Hurkishen Doss ... 162
Roop Ram Doss v. Saseeram Nath Kurmokar 141
Roy Meghraj Bahadoor v. Beejoy Gobind Burral 438
Roy Nundeeput Mahatoon v. W. Stewart... 20
Rughoobeer Thakoor v. Mirza Syefoollah Khan 289
Rughoo Nundun Singh Bahadoor v. Wilson 301
Rukmini Burmonia v. Foodum Koomaree Burmonia 408

S.

Shahzadee Hazara Begum v. The Collector of Burdwan 378
Shaik Ashruf v. Ram Kishore Ghose 288; 289
Shaik Kuramollah v. Serajul Huq ... 448
Shaikh Ameer Beparee v. Hurree Mohun Kurmokar 87
Shaikh Golam Mehdee v. Amjad Ali ... 312
Shaikh Umer Ali v. Shaik Rumzan Ali ... 347
Shamnarain v. The Administrator-General of Bengal 111
Sham Narian Chowdhry v. Court of Wards 432
Sheo Golam Singh v. Ram Roop Singh ... 25
Sheo Sahoy Pandey v. Ram Bhunjun Singh 127
Sheo Sahoy Singh v. Birj Beharee Singh ... 195
Shib Narain Singh v. Gobind Doss Bhukut. 154
Shoylendro Geer Sunnyasee v. Patoo Doss Busanea 304

Digitized by Google

	Page.
Shundhabun Mohunt *v.* Shurut Chunder Roy	160
Shurut Chunder Sen *v.* Abdool Khyr Mahomed Mohutesur Billah	327
Shustee Chunder Pattuck (*Petitioner*) ...	103
Siddhessur Dutt *v.* Sham Chand Nundun ...	285
Sitanath Doss Chowdhry *v.* Doyadronath Doss Chowdhry	54
Situl Pershad *v.* Monohur Doss	325
Soorj Narain Panda *v.* Bissambhur Singh ...	311
Sreemutty Nubo Doorga *v.* Sreemutty Seeta Monee	407
Strimathoo Moothoo Vijia Ragoonadah Ranee Kolandapuree Natchiar *v.* Dorasinga Tever	314
Suntosh Ram Doss *v.* Gera Pattuck ...	22
Suroop Chunder Mitter *v.* Dhonaye Biswas	102
Suttobhama Bibee *v.* Hurruck Chand Golecha	322
Syed Ikram Hossein *v.* Ram Lochun Dutt..	29
Syud Abdool Ali *v.* W. H. Verner ...	73
Syud Akbur Hossein *v.* Toolsee Ram ...	17
Syud Eman Momtazuddeen Mahomed *v.* Raj Coomar Doss	187
Syud Ikram Hossein *v.* Ram Lochun Dutt	364
Syud Imdad Hossein *v.* Mahomed Ali Khan	150
Syud Villayet Ali Khan *v.* Shah Ameeroodden Ahmed	19
Syud Lootf Hossein *v.* Dursun Lall Sahoo..	424
Syud Nowab Ali *v.* Shaikh Uzir Mahomed	233
Syud Velayet Hossein *v.* Syud Wulee Ahmed	207

T.

	Page.
Tara Prosunno Mojoomdar *v.* Bishonath Sircar	144
Tara Prosunno Sircar *v.* Koomaree Debee..	389
Tara Soonduree Kuloonee *v.* Bhoobun Chunder Ghose	462
Tarinee Churn Musaddee *v.* Jabar Ali ...	21
Tekait Churamun Singh *v.* Kullyan Sahy ...	231
Tekait Het Narain Singh *v.* Gossain Luchmee Narain Pooree	256
Teluck Chand Baboo *v.* Soudaminee Dossee	108
Thakoor Jeebnath Singh *v.* Court of Wards	409
Tincouree Dossee *v.* Umbica Churn Roy Chowdhry	41

U.

Ununt Ram Hazrah *v.* Kuralee Pershad Mistree	441

V.

Vencatavarada Iyengar *v.* Venkata Luchmamal	91
Verner *v.* Syud Abdool Ali	239
Villayet Ali Khan *v.* Ameenoddeen Ahmed	19

W.

Watson & Co. (R) *v.* Mohendro Nath Paul.	436

Z.

Zumeer Sirdar *v.* Asseemoodeen Sirdar ...	257

Digitized by Google

Digitized by Google

INDEX.

CRIMINAL RULINGS.

Page.

A.

ACCUSED PERSON.

See Summary Procedure (1)

ACQUITTAL.

(1) In a case tried by Assessors, in which the accused was charged with culpable homicide not amounting to murder, he was acquitted by the Sessions Judge and one of the Assessors, while the other Assessor was for a conviction. The Government of Bengal having appealed under s. 272, Code of Criminal Procedure, the High Court, on a consideration of the evidence, set aside the order of ——, and convicted the accused of the offence charged 50

(2) The dismissal of a complaint under s. 205 operates as an —— by reason of s. 212, Code of Criminal Procedure 63

ACT XXI OF 1856.

See Opium (1)

ACT XLV OF 1860.

(1) To support a conviction under s. 188, Penal Code, there must be evidence that the order has been promulgated by a public servant lawfully empowered to promulgate such order 57

(2) Section 518 of the Code, which relates to local nuisances, has no application to a case which refers to the collection of market dues . 57

Section 79. *See Right of Private Distraint* (1)
Section 97. *See Right of Private Distraint* (1)
Section 99. *See Right of Private Distraint* (1)
Section 161. *See Unlawful Assembly* (1)
Sections 320 & 325. *See Grievous Hurt* (2)
Section 341. *See Procedure* (1)
Section 342. *See Procedure* (1)

Page.

ACT XLV OF 1860.—*(Continued.)*

Section 352. *See Procedure* (1)
Section 353. *See Procedure* (1)
Section 400. *See Dacoity* (1)
Section 420. *See Cheating* (1)
Section 457. *See Jurisdiction* (1)

ACT VI OF 1864.

Section 7. *See Whipping* (1)

ACT VII (B.C.) OF 1864.

See Contraband Salt (1)
See Rowannah (1) (2)

ACT I OF 1871.

See Cattle Trespass (1)

ACT VIII OF 1871.

Section 80. *See Enquiry* (1)

ACT I OF 1872.

Section 30. *See Confession* (2)
Section 32. *See Evidence* (4)
Section 34. *See Evidence* (2)
Section 91. *See Evidence* (3)

ACT X OF 1872.

(1) An order under s. 534, Criminal Procedure Code, must be founded on a finding that the person in whose favor it was made was dispossessed of specific immoveable property by the use of criminal force, which formed a material ingredient in the matter of a criminal conviction, and it must in terms restore such person to the property from which he had been dispossessed 54

(2) The duty imposed by —— s. 90, upon village headmen, &c., of giving information as to the occurrence of any sudden or unnatural death, is intended to apply only when such occurrence takes place at or near the village of which he is headman, or in which he owns or occupies land, &c. 60

Section 70. *See Assault* (1)

Digitized by Google

Page.

ACT X OF 1872.—*(Continued.)*

Section 116. *See Right of Private Distraint* (1)
Section 122. *See Confession* (1)
Section 148. *See Opium* (1)
Section 183. *See High Court* (1)
Section 184. *See High Court* (1)
Sections 205 & 212. *See Acquittal* (2)
Section 209. *See Compensation* (1)
See Theft (2)
Section 215. *See Complainant* (1)
Section 251. *See Postponement* (1)
Section 272. *See Acquittal* (1)
Section 282. *See Assault* (1)
Section 296. *See High Court* (1)
Section 339. *See Evidence* (3)
Section 349. *See Jurisdiction* (2)
Section 362. *See Complainant* (1)
Section 363. *See Witnesses* (1)
Section 464. *See Jury* (3)
See Whipping (2)
Section 471. *See Procedure* (2)
Section 491. *See Breach of the Peace* (2) (3)
Section 496. *See Breach of the Peace* (2)
Section 497. *See Breach of the Peace* (2)
Section 509. *See Breach of the Peace* (1)
Section 518. *See Jurisdiction* (3)
Section 530. *See Possession* (2)
Schedule II, Form E. *See Breach of the Peace* (1)
Chap. XL. *See Discretion* (1)
See Grievous Hurt (1)

ACT X OF 1873.

See Evidence (1)

ADJOURNMENT.

See Breach of the Peace (2)

ADVOCATE OF HIGH COURT.

See Sessions Trial (1)

AFFIRMATION.

See Evidence (1)

AGENT.

The liability of the resident —— of an owner, under s. 90 Act XL of 1872, arises when the owner is not resident and has no personal knowledge of the fact required to be reported; where the owner has such knowledge, the liability attaches to him ... 60

See Contraband Salt (1)

AGREEMENT.

See Possession (2)

ALTERATION OF SENTENCE ONCE SIGNED.

See Whipping (2)

APPEAL.

See Acquittal (1)

Page.

ASSAULT.

A case of ——, tried by the Assistant Magistrate of Purneah, was appealed to the Sessions Judge of that district, who ordered an enquiry, and found that the —— had been committed in Maldah, and thereupon released the accused, as the Magistrate of Purneah had no jurisdiction:

HELD that the Judge had no jurisdiction under s. 70, Criminal Procedure Code, to make such an order, the accused not having been prejudiced in his defence; and further that he ought not to have ordered the enquiry as to the place where the —— was committed, that question having no bearing on the guilt or innocence of the accused—s. 282, Criminal Procedure Code 34

B.

BELONGING TO A GANG OF DACOITS.

See Dacoity (1)

BENCH OF MAGISTRATES.

See Jurisdiction (1)

BOATMEN.

See Contraband Salt (1)

BOND.

See Breach of the Peace (1)

BREACH OF THE PEACE.

(1) Where a person who had been required to give a bond to keep the peace in the Form E to Sch. 2 of the Code of Criminal Procedure, instead of giving such bond, signed a security bond in the Form G under s. 509 of that Code for good behaviour, it was held that the latter did not constitute a binding obligation ... 1

(2) Under the Sections (491, 496, and 497) of the Criminal Procedure Code relating to security for ——, the party charged is not entitled, when sufficient time has already been given him to show cause and to produce his witnesses, to an adjournment in order to produce his witnesses. In such a case he must either bring his witnesses with him, or apply for summons in such time as to enable him to bring them into Court on the day fixed... ... 9

Digitized by Google

Page.

BREACH OF THE PEACE.—*(Continued.)*

(3) Where a complaint of —— under s. 491 of the Code of Criminal Procedure made in April last was transferred on account of a question of jurisdiction from one Deputy Magistrate to another without final orders being passed, the High Court (in January 1875), not being able to find that any —— had been committed by any one, considered that it would not be proper to make an order on a complaint preferred so long ago, and directed the dismissal of the complaint made in April last 19

See Possession (1) (2)

C.

CATTLE TRESPASS.

Where there was a dispute as to the ownership of land on which the complainant's cattle were found, the complainant stating the land belonged to A, who gave him the right to graze his cattle there, and the party charged (who had seized and impounded the cattle) claiming the land as his own, it was held that the order of the Magistrate referring the parties to the Civil Court was illegal, and that he should have disposed of the case himself under the Cattle Trespass Act, I of 1871, s. 22 2

CERTIFICATE.

See Confession (1)

CHARGE.

See Jury (2)

CHEATING.

A contractor in the Public Works Department, who was charged with —— in respect of a sum of money which he received on account for work which it was alleged he had not then finished, was acquitted on the evidence, because it was not proved (1) that there was a false pretence made use of by accused; (2) that he knew he was making use of a false pretence, or that he intended to defraud; (3) that the Public Works Department were deceived by the pretence on account of their belief in its truth, and (4) that the accused received the money with the intention of causing wrongful loss to the Government 43

Page.

CIVIL COURT.

See Cattle Trespass (1)

COMMITMENT.

See Jurisdiction (2)

COMMON OBJECT.

See Unlawful Assembly (1)

COMPENSATION.

A Magistrate in making an order for —— under s. 209, Code of Criminal Procedure, is bound, if the amount be not paid, to proceed to the recovery of it by distress and sale of the moveables of the person ordered to pay; but if such person admits he has no goods, and thereby waives the right to have the amount levied by distress, the Magistrate may proceed to imprison him in the Civil jail. The warrant of distress cannot have currency simultaneously with the imprisonment. 64

COMPLAINANT.

It is not incumbent on the Magistrate to summon every person named as a witness by the ——. s. 215, Explanation 3 of the Criminal Procedure Code must be read with s. 362, which vests a discretionary power in the Magistrate 9

See Irregularity (1)

See Theft (2)

COMPLAINT.

See Breach of the Peace (3)

CONDITIONAL PARDON.

See Jurisdiction (2)

CONFESSION.

(1) Section 122 of the Code of Criminal Procedure, which requires a Magistrate to certify on a —— his belief that it was voluntarily made, does not apply to the case of a —— taken by a Magistrate, who is actually investigating the case and examining the witnesses preparatory to commitment; but to a case where some other Magistrate takes a —— and forwards it to the Magistrate by whom the case is enquired into or tried ... 16

(2) The —— of co-prisoners cannot, under the Evidence Act, I of 1872, s. 30, be treated as evidence of ordinary character not distinguished by any special infirmity or qualifications against the other

Digitized by Google

Page.

CONFESSION.—(*Continued.*)

prisoners, as in addition to the infirmity inherent in an accomplice's testimony, they are not given on oath, and are not liable to be tested by cross-examination 24

CONFISCATION.

See Opium (1)

CONTRABAND SALT.

The High Court in this case upheld the conviction by the Magistrate under Act VII (B.C.) of 1864 s. 18, both of the owner of —— and of his agent who was transporting the salt, and declined to direct the Magistrate to pass sentence on the manjees of the boat in which the salt was being transported when seized, their boat having been already confiscated by the Magistrate ... 7

See Rowannah (1) (2)

CONTRACTOR.

See Cheating (1)

CO-PRISONER.

See Confession (2)

COUNTERFEIT COIN.

See Queen's Coin (1)

D.

DACOITY.

(1) It is necessary, in order to establish a charge under s. 400, Penal Code, that the prosecution should make out that there existed at the time specified a gang of persons associated together for the purpose of habitually committing ——, and that the accused was one of the gang 18

(2) A prisoner charged with —— and riot and acquitted, cannot be convicted of house-trespass, if the latter charge was not read out or explained to him and he was not called on to plead to it ... 59

DELAY.

See Breach of the Peace (3)

DISCRETION.

The holding of an enquiry under Chapter XL of the Code of Criminal Procedure is a matter entirely within the —— of the Magistrate of the district, or of a division of a district, and the High Court has no authority to require him to proceed under that Chapter. The taking of security for keeping the peace is also a matter within the —— of the Magistrate, provided that he has materials upon which to proceed 58

Page.

DISCRETION.—(*Continued.*)

DISMISSAL.

See Irregularity (1)

DISTRESS.

See Compensation (1)

DOCUMENT.

See Possession (2)

E.

ENQUIRY.

An —— made by a clerk of a Registry Office, with a view to ascertain whether the person who brings a receipt to take back a document, which could not be returned in the first instance, and for which a receipt was accordingly given, is the person in whose possession the receipt ought to be, is an enquiry within the meaning of the Registration Act, VIII of 1871, s. 80 55

See Discretion (1)

EVIDENCE.

(1) HELD by the majority (Jackson, J., dissenting) that the —— of a witness, who was examined on simple affirmation under the direction of the Judge, is admissible as ——. The word "omission" in s. 13 of the Oaths Act, X of 1873, includes any omission, and is not limited to accidental or negligent omission ... 12

(2) Factory books cannot be used as independent primary —— of the payment to which the entries refer;—Act I of 1872 s. 34 ... 27

(3) In a case of giving false ——, the English record written by the Magistrate was put in to prove what the accused had stated before him. The document was not interpreted to the accused in the language in which it was given, or which he understood; nor was it read over in accordance with requirements of s. 339, Code of Criminal Procedure, in the presence of the person then accused: HELD that the English record of the Magistrate was not legal —— under the Evidence Act, I of 1872, s. 91, of what the prisoner said before the Magistrate. 28

Digitized by Google

Page.

EVIDENCE.—*(Continued.)*

(4) The statement of a Police officer, who goes about from place to place and collects information from different persons, which he afterwards puts in second hand before the Court, cannot be received as —— under the Evidence Act, I of 1872, s. 32 cl. 8. The meaning of that clause is, that when a number of persons assemble together to give vent to one common statement, which statement expresses the feelings or impressions made in their mind at the time of making it, that statement may be repeated by the witnesses, and is —— ... 35

See Confession (2)
See False Charge (1)

F.

FABRICATION.

See Queen's Coin (1)

FACTORY BOOKS.

See Evidence (2)

FALSE CHARGE.

Where the charge is one of instituting a —— of an offence with intent to injure, the actual information which the prisoner made at the thannah ought to be given in evidence and form part of the record 32

FALSE EVIDENCE.

See Evidence (3)
See Perjury (1)

FENCE.

No order fining a party for not repairing a —— ought to be passed without an information against him and a hearing 63

FINE.

See Fence (1)
See Rowannah (2)
See Theft (2)

FRIVOLOUS CHARGE.

See Theft (2)

G.

GOOD BEHAVIOUR.

See Breach of the Peace (1)

GOVERNMENT.

See High Court (1)

Page.

GRIEVOUS HURT.

(1) Where a prisoner was charged under Indian Penal Code, ss. 304, 325, and 323, and the jury brought in a verdict of guilty under s. 335, HELD that he was not acquitted of ——, but found guilty of the offence described in s. 322, with the extenuating circumstance which would confine the punishment within the limits specified in s. 335 61

(2) To make out the offence of voluntarily causing —— under s. 325, Penal Code, there must be some specific hurt, voluntarily inflicted, and coming within some of the eight kinds enumerated in s. 320. 65

H.

HEADS OF CHARGE.

See Jury (3)

HIGH COURT.

The —— declined, on a reference under s. 296, Code of Criminal Procedure, to interfere with the order of a Magistrate rejecting an application for the restitution of property which had been sold some years ago under the provisions of ss. 183 and 184 of the Code. The proper mode of raising the question as to the propriety of the order would be by a regular suit against the Government ... 30

See Acquittal (1)
See Revision (1)
See Summary Procedure (1)

HOUSE-BREAKING BY NIGHT.

See Jurisdiction (1)

HOUSE-TRESPASS.

See Dacoity (2)

I.

INFORMATION.

See False Charge (1)
See Fence (1)

IMPRISONMENT.

See Compensation (1)

INTENT TO INJURE.

See False Charge (1)

IRREGULARITY.

The omission to comply with prescribed formalities before issuing the summons, will not vitiate the proceedings after summons so as to enable a complainant to re-open the case 63

Digitized by Google

Page.

J.

JUDGE'S STATEMENT.

See Jury (3)

JURISDICTION.

(1) A Bench of Magistrates has no —— to try a charge for lurking house-trespass by night, or house-breaking by night, under s. 457 of the Penal Code 6

(2) A party, charged along with others with murder, having had a conditional pardon granted to him by the Deputy Magistrate, retracted before the Sessions Judge the statements he had made before the Deputy Magistrate. On being sent back to the Deputy Magistrate, that officer committed him for trial on a charge of giving false evidence. The Sessions Judge considered that the Deputy Magistrate was bound under s. 349, Code of Criminal Procedure, to commit on the original charge of murder, and not on that of giving false evidence, and he recommended that the order of commitment should be quashed, and the Deputy Magistrate directed to commit on the charge of murder.

The High Court declined to interfere, as there was evidence on the record tending to support the charge for giving false evidence, and as s. 349 did not have the effect of taking away from Magistrates the power to entertain a charge of this kind 12

(3) A Magistrate's —— under s. 518, Criminal Procedure Code, to direct the removal of an obstruction, is confined to cases where there has been annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or where there is a probability of a riot or affray ... 34

See Assault (1)
See Cattle Trespass (1)
See High Court (1)
See Possession (1)
See Procedure (1)

JURY.

(1) Where a party objects to the verdict of a ——, he ought to give the Magistrate reasonable *primâ facie* ground for the opinion either that the —— did not in fact apply a judicial discretion to the case, or that the verdict was such as the —— could not have

Page.

JURY.—*(Continued.)*

arrived at by a proper exercise of their discretion upon the materials before them 15

(2) The High Court set aside the verdict of a —— in this case, because the Judge, in his direction to the ——, omitted to point out the absence of evidence very material to the case of the prosecution, and because he directed the —— to attribute an undue importance to the statements or excuses made by the prisoner in the explanation of certain documents 21

(3) HELD that the words in s. 464, Code of Criminal Procedure, that in trials by —— "heads" of the Judge's "charge" are to be recorded, must be construed reasonably, and include such statement on the part of the Sessions Judge as will enable the Appellate Court to decide whether the evidence has been properly laid before the ——, or whether there has been any misdirection in the charge ... 32

(4) In forming a ——, a Sessions Judge should endeavour to seek for persons of an independent condition in life, men of judgment and of experience 35

L.

LAND DISPUTE.

See Cattle Trespass (1)
See Possession (1) (2)

LIABILITY.

See Agent (3)

LURKING HOUSE-TRESPASS BY NIGHT.

See Jurisdiction (1)

M.

MAGISTRATE.

See Discretion (1)

MAGISTRATE'S RECORD.

See Evidence (3)

MARKET DUES.

See Act XLV of 1860 (2)

MURDER.

A Sessions Judge is bound to decide whether the offence committed is —— or culpable homicide not amounting to ——, even if the person who struck the fatal blow is not under trial 58

Digitized by Google

Page.

O.

OATH.

See Evidence (1)

OBJECTION.

See Jury (1)

OBSTRUCTION.

See Jurisdiction (3)

OCCUPATION.

Residence in a dwelling-house belonging to another is not —— of land within the meaning of s. 90 Act X of 1872 60

OPIUM.

On a conviction under Act XXI of 1856 of having in possession —— not supplied from the Government stores, the Magistrate trying the case summarily under s. 222, Code of Criminal Procedure, a sentence of fine, or imprisonment, and confiscation of the —— was passed: HELD that the case could not be tried summarily, the additional sentence of confiscation not coming under s. 148, Criminal Procedure Code 33

P.

PERJURY.

Charges of —— ought to be based strictly upon the exact words which are used by the person who is charged; and no evidence which does not profess to give those exact words can alone be a safe foundation for a conviction .. 28

See Evidence (3)

POLICE OFFICER.

For the purposes of a judgment in Sessions trials, the testimony or conduct of ——s concerned should be scrutinized and commented on in the same degree as those of other material witnesses, and not further 65

See Evidence (4)

POSSESSION.

(1) The —— in regard to which the Magistrate's jurisdiction under s. 530 of the Code of Criminal Procedure should be exercised, must be of a real and tangible character.

(2) When a party claims under a document or agreement the right of doing certain things over a large extent of territory, the performance of acts under such alleged

Page.

POSSESSION.—*(Continued.)*

right in one portion of the ground over which the right extends, although it may be good and sufficient for the purpose of keeping alive that right so as to be an answer to the plea of limitation raised in a civil suit, is not of itself a sufficient —— on which the Magistrate's order under s. 530 may be based for the purpose of forbidding in a distant locality acts not necessarily in conflict with such ——, though at variance with the right 45

See Procedure (4)

POSTPONEMENT.

If an accused has not his witnesses present, the Judge should, under s. 251, Criminal Procedure Code, if he sees grounds for proceeding, first call upon him for his defence, and then postpone the case ... 58

PRELIMINARY ENQUIRY.

See Procedure (2)

PRESUMPTION OF GUILT.

See Theft (1)

PRINCIPAL.

See Contraband Salt (1)

PRISONER'S EXPLANATION.

See Jury (2)

PROCEDURE.

(1) The accused in this case were convicted by the Magistrate summarily of offences under ss. 352 and 341, Penal Code, although it was contended on their behalf that, if guilty, they ought to have been convicted under s. 353, in respect of which a summary trial could not be held. The Sessions Judge, on the Magistrate's own judgment, recommended that the convictions should be set aside on the grounds (1) that the facts showed that the accused should have been convicted under s. 353, or under s. 342, and (2) that the Magistrate had no power to convict of the lesser offence, and so give himself jurisdiction to try the case summarily:

HELD, in concurrence with the Sessions Judge, that the accused ought to have been tried under s. 353: the Magistrate's summary proceedings were accordingly set aside, and a fresh trial directed... 3

Digitized by Google

Page.

PROCEDURE.—*(Continued.)*

(2) Under s. 471, Criminal Procedure Code, the Court must first make a preliminary enquiry to satisfy itself that a specific charge coming under the Sections mentioned in it ought to be preferred against the accused; and after being so satisfied, it must either commit the *case*, or send the *case* to the Magistrate for enquiry whether a committal should be made or not 39

(3) It is a general principle that judgment must be delivered by the Judge who has heard the evidence 59

(4) In a case under s. 530, Code of Criminal Procedure, the High Court set aside the proceedings of a Deputy Magistrate, who, on succeeding his predecessor who had gone into the case, instead of recalling the witnesses *de novo*, and examining them himself, decided the question of possession on the evidence which had been taken by his predecessor ... 62

See Opium (1)
See Whipping (2)

PROSECUTION.

See Jury (2)
See Sessions Trial (1)

PUBLIC JUSTICE.

See Summary Procedure (1)

PUBLIC WORKS DEPARTMENT.

See Cheating (1)

Q.

QUEEN'S COIN.

Where the charge is one of counterfeiting ——, direct proof of fabrication is not necessary to render the person punishable under the Sections of the Penal Code, with reference to the uttering of false coin. All that is required is a guilty knowledge of the spuriousness of the coin at the time of receiving possession of it, or the absence of such guilty knowledge at first. Such guilty knowledge may be proved either directly or indirectly from surrounding circumstances 4

R.

REGISTRY.

See Enquiry (1)

RESISTANCE OF DISTRAINT.

See Right of Private Distraint (1)

Page.

RESTITUTION OF PROPERTY.

See High Court (1)

REVISION.

The difference of opinion on a question of proof between a Magistrate who did, and another who did not, hear the witnesses, is not a ground on which the High Court will be disposed to exercise its powers of —— 64

RIGHT OF PRIVATE DISTRAINT.

A zemindar is justified in exercising his —— of crops, if he has served the defaulters with written notices under Act X of 1859 s. 116: and in such a case, ryots who knowingly resist the distraint are not protected by the Penal Code, s. 79. But if the zemindar's people enter upon crops with intention of distraining without notice, the ryot-owners are justified in considering such action as trespass.

Quære.—Would the ryots in the latter case be protected by the provisions of the Penal Code, ss. 97 and 99, in preventing the distraint and confining the men employed to make it? 40

RIOT.

See Jurisdiction (3)
See Summary Procedure (1)
See Unlawful Assembly (1)

ROWANNAH

(1) A ——, as defined by Act VII (B.C.) of 1864, is complete on the face of it without any certificate by way of endorsement signed by the superintendent showing that the endorsement made by the Preventive Officers of Customs has been examined by him ... 6

(2) Section 16 of the Act VII only gives power to fine when the salt is not specified in a —— ... 6

S.

SALT.

See Rowannah (1) (2)

SECURITY.

See Breach of the Peace (1) (2)
See Discretion (1)

SESSIONS JUDGE.

See Whipping (2)

Digitized by Google

Page.

SESSIONS TRIAL.

An advocate of the High Court may appear on behalf of the prosecution in the Court of Sessions and conduct the prosecution without being specially empowered by the Magistrate of the District for that purpose 14

SPECIFIC CHARGE.

See Procedure (2)

STOLEN PROPERTY.

See Theft (1)

SUMMARY TRIAL.

Where a charge of rioting was tried summarily by the Magistrate as one of mischief and unlawful assembly, the Sessions Judge, relying on a case cited, submitted at the request of the accused that the summary order may be set aside, and the accused may be tried for rioting under Chapter XVII of the Criminal Procedure Code.

The High Court declined to interfere at the instance of the accused persons, and distinguished this from the case cited by the Sessions Judge, as the reference there was made by the Magistrate in the interests of public justice ... 19

See Opium (1)

See Procedure (1)

T.

THEFT

(1) Possession of property which has been stolen from the owner is generally at best only evidence of —— when the date of the —— is so recent as to make it reasonable to presume in the absence of explanation that the person in whose possession the property is found must have obtained the possession by stealing 16

Page.

THEFT.—*(Continued.)*

(2) The High Court declined to interfere with the order of a Deputy Magistrate, who, in a case of —— dismissed the complaint and fined the complainant under s. 209 of the Code of Criminal Procedure for making a frivolous and vexatious complaint 17

U.

UNLAWFUL ASSEMBLY.

No charge of being members of an —— under s. 141, Penal Code, can be sustained, where the intention of the parties was, not to enforce a right or supposed right, but to maintain undisturbed the actual subsisting enjoyment of a right which was at that time being exercised 25

V.

VERDICT.

See Jury (1)

W.

WARRANT.

See Compensation (1)

WHIPPING.

(1) Under Act VI of 1864 s. 7, a sentence of —— cannot be superadded to one of imprisonment where the imprisonment is for more than five years 49

(2) A Sessions Judge has no power, under s. 464, Code of Criminal Procedure, to alter or set aside a conviction and sentence once made and signed by him... 49

WITNESSES.

Under s. 363, Code of Criminal Procedure, a prisoner is entitled as a matter of right to have any —— named in the list which he delivers to the Magistrate, summoned and examined ... 56

See Breach of the Peace (2)

See Complainant (1)

See Evidence (1)

Digitized by Google

Digitized by Google

TABLE OF CASES.

CRIMINAL RULINGS.

	Page.
A.	
Aboo Sheikh	19
B.	
Banee Madhub Doss	3
Bachun Kadir	6
Bejoy Nath Chatterjee *v.* The Bengal Coal Company Limited	45
Bisheshwar Shaha *v.* Bishwambhur Sircar ..	64
Bindessuree Pershad *v.* Gujadhur Pershad	1
Brindabun Chunder Dutt *v.* Dwarka Nath Sen	15
Budri Roy	65
Bunwary Poddar	55
Burmah Mahto	25
C.	
Chulan Tewari *v.* Sukedad Khan ...	9
E.	
E. B. Railway Company *v.* Kali Dass Dutt	63
G.	
Ghumundee Singh	30
Government of Bengal, The, *v.* Haneef Fakir	50
Gunga Govind Palit	21
Gungadhur Sircar	14
Gurib Sheik	4
Guru Churn Sen *v.* Kali Nath Dass Biswas	62
H.	
Hoolas	32
Hurdeep Sahoy	27
J.	
Jeetoo	16
Jeldhari Singh *v.* Shunkur Doyal ...	9
Jodoo Nath Shaha	33
Jumiruddin *v.* Faizuddin	58
K.	
Kali Prosunno Bagchee	39
Kasim Shaikh...	32
Kanhai Shahee	40
Kalipuddo Poramanick	43
Kali Prosunno Roy	58
Kishory Mohun Poramanick	6
Kali Churn Lahoree *v.* Shooshee Bhoosun Sanyal	17
L.	
Lukhinarain Agoori	61
M.	
Modun Mohun Pal Chowdhry	7
Mohamed Asgar	11
Mookhtaram Sirdar	18
Mohunt Luchmi Dass *v.* L. J. Crowdy ...	19
Mohunt Luchmi Dass *v.* Pallat Lall ...	54
Mudhoosoodun Chuckerbutty	60
Mullick Jeechoo	12
Mungul Dass...	28
N.	
Naga	24
Nundo Kishore Haldar *v.* Anundo Chunder Chatterjee	64
P.	
Parushullah Mundul *v.* Kheroo Mundul ...	4
Poromeshur Aheer	16
Poran Mah	49
Prosunno Coomar Moitree	56
R.	
Ram Dutt Chowdhry	35
Ram Ruttun Shaha *v.* Bawool Mundul ...	4
Rughoonath Dass	59
S.	
Salamut Ali	59
Sewa Bhogta...	12
Shadhu Churn Ghose	63
Sheikh Tunnoo *v.* Kureem Buksh ...	2
Sheikh Mahomed Golab *v.* Mohabeer Singh	34
Shunker Singh	25
Subun Singh	57
Sree Nath Dutt *v.* Unnoda Churn Dutt ...	34

Digitized by Google

Digitized by Google

RULES AND ORDERS OF THE HIGH COURT.

	Page.
Civil C. O. No. 24.—Circulates Financial Department Resolution of 29th October 1874, relating to the cancellation of Stamps under Section 30 of the Court Fees Act	1
Civil C. O. No. 25.—Draws attention to Rule of the High Court, Original Jurisdiction, regarding charge for serving processes of other Courts	2
Civil C. Memo. No. 1.—Enquires whether the provisions of Sections 3 and 4 Regulation LVIII of 1795 are observed in each district	3
Civil C. Memo. No. 2.—Directs discontinuance of Quarterly Returns prescribed by Circular Order No. 12, dated 8th April 1872, but extends the instructions of that Circular Order to the Annual Statements	3
Civil C. O. No. 1.—Prescribes rules for the guidance of Civil Court Ameens in carrying out local enquiries	3
Civil C. O. No. 2.—Instructions to prevent the decision of cases *ex parte* against a defendant without sufficient enquiry as to service of summons	4
Civil C. O. No. 3.—Work done by a Moonsiff vested with the powers of a Small Cause Court, under s. 29, Act VI of 1871, to be shewn in a separately monthly Return in form annexed ...	4
Criminal C. O. No. 1.—Circulates Home Department Resolution No. 440, dated 16th November 1874, regarding transfer of convicts to Port Blair	5
Criminal C. Memo. No. 1.—Draws attention to Circular Order No. 5, dated 5th July 1865, regarding the maintenance of a "Register of Criminals convicted of heinous offences"	7
Criminal C. Memo. No. 2.—Circulates copy of letter to Additional Sessions Judge of 24-Pergunnahs, stating that it is not necessary that the directions to the Jury should be reduced to writing, but that the statement or "heads of charge," placed upon record, should represent with absolute accuracy the substance of the charge	7
Civil C. Memo. No. 4.—Circulates letter to Judge of Bhaugulpore, informing him that a ryot has a right in a district like his to deposit in Court such portion of his produce as represents the rent admittedly due to the zemindar ...	8
Civil C. Memo., No. 5.—Fixes the limits of the pay of Naib Nazirs and the increments in the pay of Nazirs	9
Civil C. Memo. No. 6.—Quarterly Returns of Peons' Tullabana to be submitted by Judges of Small Cause Courts through District Judges	9
Civil C. Memo. No. 7.—Do Moonsiffs with Small Cause Court powers use Summons Books and Registers	9
Civil C. Memo. No. 8.—Inquires how Circular Order No. 21 of 1873 has worked.	10
Civil C. O. No. 3.—Calls for a report from District Judges and Judicial Commissioners, as to how the Court Fee Rules have worked	10
Scale of Costs to be ordinarily allowed to the successful party in appeals to the High Court in its Appellate Jurisdiction, to take effect from the 1st of June 1875	11

Digitized by Google

Digitized by Google

REVENUE CIRCULARS.

Page.

December 1874.

No. 1.—Prescribes Rules for the classification, &c., of English Correspondence in Collectors' Offices 1

No. 2.—Substitutes new Rules regarding estimates for local improvements for those in cls. 1 to 10, Sec. III, Ch. VII, p. 150 of the Board's Rules 9

No. 3.—Calls attention to correspondence with Government, explanatory of a previous order of Government regarding Settlements, and makes alterations in Sec. II, Ch. VII of the Board's Rules... 14

No. 4.—Cancels first part of Statement prescribed by Board's Circular No. 1 of 1874 regarding establishments ... 16

No. 5.—Circulates Government Resolution on the cancellation of Court Fee Labels, and cancels Board's Circular No. 13 for November 1872 16

No. 6.—Circulates Financial Department Resolution regarding the refund or renewal of a Stamped Paper ... 17

No. 7.—Explains how cols. 16 & 18 of Return No. XVI are to be filled up ... 17

No. 8.—Enjoins the preparation by Collectors of briefs of wards cases which are appealed to the High Court ... 17

No. 9.—Makes additions to cl. 23, Sec. IX, Ch. II, p. 30, and to cl. 10, Sec. XIV, Ch. V, p. 74 of Board's Rules ... 18

No. 10.—Addition to para. 13 of the Instructions for the administration of the Land Acquisition Act, X of 1870, and to para. 1 of the Special Instructions to be observed when land is required for a Railway, &c. 18

Forms 25 to 28.

January 1875.

No. 1.—Addition to Board's Rules, cl. 1, Sec. VI, Ch. XVIII 18

No. 2.—Publishes revised Rules for the supply of copies of, and information respecting, Papers and Documents in Collectors' Offices.—Register No. 62 cancelled 18

February 1875.

No. 1.—Circulates slips of directions contained in Circular Order No. 3 of November 1874 29

Page.

No. 2.—Permits Managers of Wards' Estates to keep their accounts for March open for a period not exceeding one month, with a view of preventing the entry of large sums of money in Table VI of Return No. XXXI under heading "suspense account" 29

March 1875.

Errata 29

Erratum 29

No. 1.—Promulgates Rules for guidance of Proceedings held by District Officers for realization of Stamp Fees in Pauper Suits 29

No. 2.—With reference to Government Order (copy annexed) regarding ss. 49 and 50 of the General Stamp Act, intimates that documents not correctly prepared are to be considered as insufficiently stamped, and treated accordingly 31

No. 3.—Explains that the word "Demand" in cl. 1, Sec. III, Ch. II, p. 23 of Board's Rules means current, and not gross demand, which includes arrears... 32

No. 4.—Requests that the several classes of estates enumerated be accurately distinguished, and that alterations be made in Sec. IV, Ch. XXV, Board's Rules ... 32

No. 5.—In consequence of recent Rulings of the High Court and the Judicial Committee of the Privy Council, modifies orders made under Regulation XI of 1825 and Act IV (B.C.) of 1868 ... 33

No. 6.—Corrections in Rule 8 of Board's Rules, published with Circular Order No. 1 of December 1874 34

No. 7.—Draws attention and makes addition to cl. 9, Sec. XIII, Ch. XI, p. 188 of Board's Rules regarding the withdrawing of money from a Government treasury under a power-of-attorney ... 34

No. 8.—Requests local officers to make themselves acquainted with the facts, in respect to the intervention of parties having rights between the zemindars and the cultivators, before recommending in future any remission of revenue to zemindars upon condition that the ryots should participate in it... ... 34

No. 9.—Notifies changes in the selling price of excise opium with effect from 1st April 1875 35

Digitized by Google

Page.

No. 10.—Substitutes new form of store book for that referred to in cl. 4, Sec. III, p. 305 of Board's Rules 35

April 1875.

Erratum 35

No. 1.—Draws attention to Act IX of 1875 regarding majority of minors ... 35

No. 2.—Alterations in Waste Land Rules, and substitution of new form of Table III, Return XLV, for that at page 24 of those Rules 35

No. 3.—Adds cl. 12A, Sec. VI, Ch. XVIII, p. 260b, Board's Rules, regarding Commissioners noticing working of fund for improvement of Government and temporarily settled estates 36

No. 4.—Substitutes rules for cl. 10, Sec. IX, Ch. XX, p. 284 of Board's Rules, regarding allowances to settlement-holders, &c. 36

Page.

No. 5.—States that revised forms of Return No. XII and Register No. 65 have been prescribed 37

No. 6.—Alterations and additions to Return No. XXXI 37

May 1875.

No. 1.—The instructions contained in C. O. No. 2 of December 1873 will now apply only to cases where land is taken up for a Company or Municipality 39

No. 2.—Expunges certain words from cl. 3, Sec. VI, Ch. III (page 44) of Board's Rules. 39

No. 3.—Substitutes new rules for Ch. XI, Sec. VI, page 179 of Board's Rules ... 39

No. 4.—Various alterations in Sec. III, Ch. XIX, page 266, Board's Rules, and cancellation of Circular No. 20 of 1871 40

No. 5.—Makes an addition to cl. 6, page 49 of Board's Rules 40

Digitized by Google

The Weekly Reporter.

CIVIL RULINGS.

The 18th September 1874.

Present :

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Jurisdiction—Execution Sale in Separate Lots—Irregularity—Injury—Act VIII of 1859 *s.* 6.

Case No. 201 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 20th April 1874.

Moulvie Abdool Hye (one of the Defendants, Judgment-debtor) *Appellant,*

versus

J. Macrae (Auction-purchaser) and another (Decree-holder) *Respondents.*

Mr. C. Gregory, Moonshee Mahomed Yusoof, and *Baboo Judoonath Sahoy* for Appellant.

Mr. G. H. P. Evans for Respondents.

A Subordinate Judge, on the application of a judgment-creditor, ordered the attachment and sale of an indigo concern consisting of several factories, and fixed the 9th March for the sale. Shortly before the date so fixed, he issued a direction to the District Judge's Nazir that the sale should be effected in portions to be sold in succession. Upon this, the District Judge removed the execution proceedings to his own Court, and issued a roobokaree declaring the Subordinate Judge's order null and void, and ordering the property to be sold on the day fixed in one lot. This was accordingly done.

HELD that the District Judge had no authority to call up an execution case from the file of the Subordinate Judge to his own Court, as Act VIII of 1859 s. 6 did not authorize the transfer of proceedings already commenced and entertained.

HELD that it was entirely within the Subordinate Judge's discretion to direct that the property should be sold in portions even though it had been attached or proclaimed as an entirety.

HELD that as it is damage to a person to have his whole property sold against his will to satisfy the claims of a creditor when the sale of a portion would suffice, the irregularity committed by the District Judge caused material injury to the judgment-debtor.

Phear, J.—THIS appeal arises out of certain proceedings in execution taken in the Subordinate Judge's Court of Sarun for the purpose of obtaining execution of a decree of that Court against one Moulvie Abdool Hye.

It appears that on the 4th September 1873, the Subordinate Judge, upon the application of the judgment-creditor, ordered the attachment and sale of an indigo concern which consisted of several dependent factories. Various proceedings seem to have taken place after this date in the matter of this execution ; and on the 22nd January 1874, the Subordinate Judge issued a sale proclamation fixing the day of sale for the 9th March. So late, however, as the 6th March, the Subordinate Judge issued a direction that the sale of the property should be effected in portions, that is, the different constituent factories of the entire concern should be sold separately in succession until the requisite amount of money should be realized. At that time, in consequence of a Circular Order of this Court, the Nazir of the Judge's Court was the proper officer within the meaning of Section 248 of the Civil Procedure Code to effect the sale of property in execution of the proceedings in the Subordinate Judge's Court. And therefore the Subordinate Judge transmitted the direction, which has just been spoken of, with respect to the sale of the property in portions, to the Judge's Nazir through the Judge. Upon thus receiving this direction, the Judge at once removed the execution proceedings from the Subordinate Judge's Court to his own Court and took the entire

Digitized by Google

control of them into his own hands. And on the 9th March, the very day appointed by the Subordinate Judge for the sale of the property, he passed the following order, or perhaps it would be more right to say, made and issued the following roobokaree. It is headed "Memorandum" and runs in these words:—"Read the Subordinate Judge's roobokaree, dated the 7th instant, also my vernacular order thereon of the same date.

"Also the Subordinate Judge's reply thereto of the same date.

"Also the original bond, dated the 11th Jeyth 1271 F., corresponding with May 1864.

"Also the decree, dated the * Also the "Mal talika" given in in execution of this decree on the 22nd January 1872.

* Blank in original.

"Also the return of service thereof, and of attachment, dated the 9th March 1872.

"The point is, are the several factories "mentioned in the above bond, decree, mal "talika, and return, to be sold in one lot or "separately as per list herewith, in the order "given in the list.

"The Subordinate Judge requests me to "direct my Nazir to sell them separately.

"If this be an order passed by himself "I consider it illegal.

"If it be a recommendation, I think it "most unadvisable to take this course.

"I consider such an order illegal. First "it is based on the request of the decree-"holder and of the judgment-debtor Abdool "Hye. But all the property now attached "was placed by my predecessor under the "charge of a manager appointed under "Section 243 of Act VIII, and it is at this "present moment in his management under "me. And as the Subordinate Judge only "a month or two ago attached the last year's "indigo outturn of these very factories, and "heard an original suit having reference "thereto, to which the manager and not "Abdool Hye was a party, he must have "been aware of the state of the case, and "he should have known that this very decree "was included in the management, and that "the manager was the person legally to be "heard, and not Abdool Hye, and as the "manager has not appeared at all, therefore "the Subordinate Judge's order is on this "point illegal and without jurisdiction.

"And secondly, it is illegal because it is "opposed to the terms of the bond, decree, "and notice of attachment. The factories "form one concern, and they cannot in "execution be split up into several with-"out much difficulty and litigation aris-"ing therefrom. In his English Memo: "the Subordinate Judge says that the fac-"tories were mortgaged separately detail-"ed. He does not say that they were "mortgaged separately. Nor are they mort-"gaged separately. There is but one mort-"gage bond covering them all, not several. "And it is beyond dispute that Arwah is "the head factory at which the manager "lives, and that the other factories at which "his assistants live are its out-works. The "separate detail of these latter does not "show that they were mortgaged separately. "In a mortgage of a house its out-offices "and stables are often thus separately detail-"ed. But no one would suppose that they "were thereby mortgaged separately, and a "perusal of the mortgage bond shows that "they were mortgaged together, and they "were decreed in the same way.

"The Subordinate Judge says that the "attachment of each was made separately. "But this is not the case. Being each a "few miles from the other, the notice was "not served at each at the same time. But "there is but one notice covering all—and "the same return of service of attachment, "and they were clearly attached together as "a whole concern—and therefore to separate "them thus in execution of decree at the "time of sale would give rise to endless "litigation about title, and would be doing "what is not lawful to do in execution. "Then it is unadvisable to sell them separ-"ately. The concern has been under this "Court for some years, and I have been "here a year, and the manager and I concur "in thinking that as good a price would not "be realized by selling the factories separ-"ately as by selling them together. In the "first place this sale is held on a first mort-"gage. There are very large debts on the "concern and many decrees and attachments "against it, and in this sale alone, therefore, "can a good title be had. Purchasers, there-"fore, will give a much better price now than "at any other sale. It is necessary, therefore, "to adhere strictly to the terms of the "mortgage and attachment, otherwise if "the title be interfered with and any varia-"tion made, then a loop-hole for a law suit "arises, and the property consequently will "not fetch as much. No doubt, it is imma-"terial whether one sale or several be held as "far as the decree-holder cares. He is sure "to get his money, and it may be that the "judgment-debtor would prefer several "sales to a single one. For I observe that "the sudder factory Arwah is put forth on

Digitized by Google

"the proposed list of sale, and it is possible "that the price realized for the three out-"works that stand before it might satisfy "this decree; and it would then remain unsold "this day, and as this first mortgage would "have disappeared, and as no body at any "subsequent sale on any of the other attach-"ments on it would have the remotest "chance of getting any clear title like at "present, no such price for it would be got "subsequently as could be got now; and the "title being vague, the judgment-debtor "might possibly hope to buy it in the name "or with the aid of some of his relatives "for a small sum But I have other interests "besides those of the decree-holder and the "judgment-debtor to look to. There are "several lacks of debts on the concern, one "person having a debt of more than four "lacks on it, and I must get as good a price "as possible in order that, after the present "decree shall have been satisfied, there shall "remain as large a surplus as possible to be "divided rateably amongst the remaining "attaching judgment-creditors. The judg-"ment-debtor has no other property worth "mentioning, and, no doubt, does not care "how much the concern will fetch. There "is no possibility of its price being sufficient "to pay all the debts on it, and as he has no "other property to be sold, he can have no "open motive for wishing the sale to be held "one way or another,—in one lot or in several. "His only motive must be that given above, "*viz.*, that he passes by making a confusion "and complicating the title to secure a good "out-work for himself chiefly, and leaving "little or nothing for the rest of his creditors, "the out-works at the end of the list being "likely to fetch but very little if sold separ-"ately."

"No doubt the Subordinate Judge was "unaware of all these matters, but he knew "that the estate is under management under "this Court, that there are many attachments "and decrees against it, some in his Court "and some in mine, and that if he were not "acquainted with the affairs relating to this "concern and to Abdool Hye's debts that I "and the manager were, and he might easily "therefore have ascertained from us the "propriety and advisability of selling the "concern in one lot or several.

"Therefore that which has been mortgaged, "decreed, and attached, that exactly and no "more or less must be sold. If the Subor-"dinate Judge meant to give an order I treat "it as null and void: if a recommendation, I do "not think it right to adopt it. The sale "therefore will proceed, the property being "put up in one lot."

We have read this order or judgment in full, because it bears an unusual shape and certainly is couched in remarkable terms. In consequence of this order the property was sold. And the judgment-debtor then made an application to the Subordinate Judge under the provisions of Section 256 of the Civil Procedure Code, asking to have the sale set aside on the ground of irregularity; in truth, on the ground that the proceedings had been altogether misconceived, and that the Judge had no jurisdiction to do that which he had done. But before the Subordinate Judge could enter upon the merits of this application or indeed entertain it in any way, the Judge removed it to his own Court. And on the 20th April 1874, passed the following order upon it:—"All the objections "in this petition have been met by my order "of the 9th ultimo" (that is the order which has just been read in extenso) "at the time "of sale. There never was the least "possibility of this property fetching suffi-"cient to clear the debts on it, and the peti-"tioner's only motive therefore must have "been what I have therein stated it to be,—a "hope that he might compromise the title "and get some interest of the property "*benamee* at a cheap rate by so doing. The "petitioner does not see that when chiefly "for the benefit some years ago the manage-"ment of this estate was taken by this Court, "it become the duty of the Court to consult "the interest of the attaching judgment-"creditors in a body as well as his own, and "the first mortgagor wishes the sale was "held on these principles; it was uniform on "every point; there is no error or flaw in "any of the proceedings, and the petitioner "has suffered no injury whatsoever thereby. "This order will be read with my order of "the 9th, and this objection is dismissed with "costs." That is, the application which the judgment-debtor made to the Subordinate Judge under Section 256 of the Civil Procedure Code is dismissed by the Judge for the reasons here given.

On appeal to this Court against this order of the Judge, it is objected both that the action taken by the Judge in regard to the execution proceedings and sale on the 9th March, and also that the action taken by him in removing the application of the judgment-debtor under Section 256 from the Court of the Subordinate Judge to his Court, were entirely wrong and without any legal foundation.

Digitized by Google

In the argument of which we have had the benefit, it has not been seriously contended that the Judge had authority to act as he did in the matter of the execution proceedings and the holding of the sale. Section 6 of the Civil Procedure Code, no doubt, authorizes the District Court "to withdraw "any suit instituted in any Court subordinate "to such District Court, and to try such suit "itself or to refer it for trial to any other "Court subordinate to its authority, and "competent in respect of the value of the "suit to try the same, whenever it may see "sufficient cause for so doing."

But it has been held more than once by decisions of this Court that this Section does not authorize the District Court to remove to itself or to transfer to any other Court proceedings in a suit which have been already commenced and entertained in any Court subordinate to itself. In particular it was held in the case of Luchmeeput Doogur *versus* Maharajah Juggut Indur Bunwaree Lall, reported in Marshall, page 195, that this Section does not authorize the District Court to make an order calling up an execution case from the file of the Subordinate Court to its own Court. That decision has never, as far as we know, been impeached. And indeed there are other decisions of this Court (see Regular Appeals Nos. 43 to 48 of 1873, decided on the 8th January 1874*) which are entirely in conformity with it. The result is that every thing which took place in consequence of the Judge's order of the 7th March, and under his directions with regard to the sale which was effected on the 9th March, was entirely irregular and without any show of jurisdiction.

Now Section 256, under which the present application to the Court is made, runs as follows: "No sale of immoveable property shall "become absolute until the sale has been "confirmed by the Court. At any time "within thirty days from the date of the sale, "application may be made to the Court to "set aside the sale on the ground of any "material irregularity in publishing or conducting the sale, but no sale shall be set "aside on the ground of such irregularity, "unless the applicant shall prove to the "satisfaction of the Court that he has sustained substantial injury by reason of such "irregularity."

In the present case, not only was there the irregularity which has already been pointed out with regard to the conduct of the sale after the 7th March, but it appears clear that this operated to the disadvantage of the judgment-debtor. The Subordinate Judge, who was charged with the responsibility of effecting the sale of this property in execution of the decree against Abdool Hye, thought proper to direct previously to the sale which was about to take place on the 9th March that the property should be sold in portions. It was entirely within his discretion to give this direction, even though the property was attached or proclaimed, as the Judge says, it was, as an entirety. And he appears to have done this deliberately, actuated by the opinion that it was best for the interests of the judgment-debtor that this should be so. And indeed this matter does not rest merely upon the opinion of the Subordinate Judge, because it is plain from the order or roobokaree of the Judge which has been read out in full that the Judge himself was of opinion that almost certainly the judgment debt for which this property was to be sold, would be discharged by a sale of a portion only of the property, and that therefore it was not necessary that the whole property should be sold for that purpose. Now it need only be stated in order to appear clear that it is damage to a person to have his whole property sold against his will to satisfy the claims of a creditor, when the sale of a less portion would be sufficient for that purpose. The words of the Judge are— "It is possible that the price realized for the "three out-works that stand before it might "satisfy this decree, and it (that is, I think, "the principal factory) would then remain "unsold this day, and as this first mortgage "would have disappeared, and as no body "at any subsequent sale on any of the other "attachments on it would have the remotest "chance of getting any clear title like at "present, no such price for it would be got "subsequently as could be got now." If there is any value in this reasoning, it consists in that portion of it which has regard to the interests of other parties than those who were before the Court of the Subordinate Judge in the matter of this execution. And it is beyond question that the judgment-debtor was entitled to such benefit as he could have from the situation in which he would be placed by having paid off his first and principal creditor, and being left with the remainder of his property to make such terms as he best could with the remaining creditors. So that it seems quite plain beyond the need of any argument that the irregularity in the conduct

* 21 W. R., 196.

Digitized by Google

of the sale which resulted from the action taken by the Judge, namely, the irregularity of the Judge's Nazir selling contrary to and in disregard of the directions of the Subordinate Judge, did cause material injury to the judgment-debtor in the matter of this sale. And we can see that the Judge could hardly have gone so wrong in this matter as he appears to us to have gone if he had not been mainly influenced by a consideration (whether discreet or not we need not express an opinion) for the interests of other people than the judgment-debtor and judgment-creditor in this particular suit. Throughout his order or roobokaree of the 9th March, it is apparent that the Judge claimed for the judgment of himself and of the Court manager of this property, in regard to the sale of it, a dominant authority above that of the Subordinate Judge who was charged with the duty of enforcing satisfaction of this decree, on the ground that he and the manager together were *quasi* trustees, somewhat in the position of an official assignee of bankruptcy in whom property is vested for equal distribution amongst a large number of creditors.

It is not necessary now to dwell upon passages of the Judge's order which tend in this direction, for in truth the whole tenor of the order lies this way. And if we may say so, there is even apparent in it almost a tone of indignation that the superior judgment of the Judge and of the person who had been so long managing this property should be in any way disputed or attempted to be interfered with by the Subordinate Judge. In the last passage, the Judge says:—"No doubt, the "Subordinate Judge was unaware of all "these matters, but he knew that the estate "is under management under this Court, "that there are many attachments and "decrees against it, some in his Court and "some in mine, and that if he were not "acquainted with the affairs relating to this "concern and to Abdool Hye's debts, that I "and the manager were, and he might easily, "therefore, have ascertained from us the "propriety and advisability of selling the "concern in one lot or several.

"Therefore that which has been mortgaged, "decreed, and attached, that exactly and no "more or less must be sold. If the Subor-"dinate Judge meant to give an order I treat "it as null and void; if a recommendation, "I do not think it right to adopt it."

The Judge unfortunately is the person who here as it seems to us has fallen into error. It is his order which is null and void, and it is the order of the Subordinate Judge which ought to have had effect given to it, and under which the sale ought to have been carried out. It may be unfortunate for the innocent purchaser that this should have happened. Still he does not seem now to have any good ground to complain. He selected the very Court manager himself as his agent for effecting the purchase and allowed him to bid in his own name as principal. It is also noteworthy that there were no other bidders at the sale than this manager and the judgment-creditor, whose debt by the admission of the Judge would have been discharged by a sale of a portion of the property only. It is difficult to avoid the conclusion that the bargain for the entirety ultimately effected by the manager in this way must have been very favorable to the buyer. On the whole, this proceeding does not present a very satisfactory aspect, following as it did as a consequence of the Judge's order made on the manager's advice; and might possibly itself, if looked into, afford ground to justify a Court of Equity in setting aside the sale. But however this may be, it does not seem to us that the fault or miscarriage was due to the judgment debtor or to the judgment-creditor in the case which is before us. And therefore, we see no reason for treating this case as materially differing from the ordinary cases which come under the notice of this Court when applications to set aside sales pursuant to provisions of Section 256 are made.

On the whole, it appears to us plain that by reason of the action of the Judge there was grievous misconduct in the matter of the sale and that material injury has been done to the judgment-debtor as a consequence. We are, therefore, obliged under Section 256 to order the sale to be set aside, but at the same time we couple that order with the condition under Section 258 that the purchaser do receive back his purchase-money with 6 per cent. interest thereon from the time at which he paid it until the date on which he shall be repaid the money.

We think that the appellant must have his costs in this Court and in the Court below. We assess pleader's fees at 50 rupees.

Digitized by Google

The 5th November 1874.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert, P. Collier, and Sir Lawrence Peel.

Trust Property—Fiduciary Relationship—Purchase by Trustee.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Dhonendro Chunder Mookerjee

versus

Mutty Lall Mookerjee.

J, as the executor of his deceased father S, obtained a decree which he held in trust for S's heirs, namely, himself and brothers. One of the brothers (H) died, leaving J and M his executors. M then sold to J the interest of H's sons for an inadequate consideration.

HELD that, according to the rules of equity, the sale could not stand; but that J was bound to return to H's sons their share in that estate, upon receiving back the purchase-money.

HELD that the sale was equally invalid against any other person for whose benefit the trustee (J) may have purchased secretly in his own name, as it would be against the trustee himself.

THIS was a suit instituted by the sons of Hurrish Chunder against Juggut Chunder and Sreeman Chunder Mookerjee, praying, amongst other things, that a certain deed of assignment, dated the 23rd of June 1854, of the plaintiffs' shares and interest in a certain decree, which had been sold by Mohes Chunder Mookerjee to Juggut Chunder Mookerjee, might be declared as against them invalid and void as an absolute conveyance, "and that the said assignment might be "decreed to stand as a security only for the "sum of Rs. 5,000, and for anything "further which might be found justly due "from the plaintiffs to the defendants." Mohes Chunder Mookerjee was made a party to the suit, but no relief was prayed against him. The ground upon which the bill was framed was that Juggut Chunder, who purchased the decree, stood in a fiduciary relation to the plaintiffs, and that he had purchased the decree for an inadequate consideration. It appears that Doorga Chunder Mookerjee was the father of Sib Chunder, Sumboo Chunder, and Ramnarain; that Doorga Churn Mookerjee was possessed of considerable property, and having died, his three sons divided the estate. Sumboo Chunder took a portion of the estate, and Sib Chunder covenanted with Sumboo Chunder to discharge all claims against the estate of Doorga Churn. A claim was made against Sumboo Chunder and others, as representatives of Doorga Churn, and a decree was obtained against them for about two lacs of rupees. Sumboo having died, Juggut as one of his executors compromised the suit for 80,000 rupees, and, as such executor, brought a suit against the representatives of Sib Chunder to recover that amount and other monies from his estate; and in that suit he obtained a decree for one lac and 70,000 rupees. That suit was brought by Juggut Chunder as the executor of Sumboo Chunder. The question is whether, in that position, and in that character, he did not hold a fiduciary relation to the plaintiffs in the suit. Sumboo Chunder died, leaving six sons, Juggut Chunder, who is the defendant in this suit, Mohes Chunder, who is also made a party to this suit, Hurrish Chunder, Prawn Chunder, Cally Chunder, and Sreeman Chunder; but Sumboo Chunder before he died made a will, by which he left his property to his five sons. Sreeman Chunder was not then born.

Hurrish Chunder died, leaving the plaintiffs in the suit his heirs, and consequently Juggut Chunder held the decree which he recovered against the representatives of Sib Chunder in trust for the benefit of himself and his brothers, and as to the share of his brother Hurrish Chunder for the benefit of the plaintiffs. Hurrish Chunder appointed Juggut Chunder and Mohes Chunder his executors; and Mohes Chunder, as one of the executors of Hurrish Chunder, sold the interest of Hurrish Chunder's sons to Juggut Chunder for the sum of 5,000 rupees; in other words, he sold a fifth share of a decree for 1,70,000 rupees for 5,000 rupees. The Courts found that that was under value, and that an inadequate consideration was given by Juggut Chunder to Mohes Chunder for the purchase. It is said that Juggut Chunder as one of the representatives of Hurrish Chunder, renounced. Whether he did so renounce, or could renounce, appears to be immaterial, provided he held in a fiduciary character, as executor of Sumboo Chunder, the share which belonged to the plaintiffs as the sons of Hurrish Chunder. It is clear that he held the decree which he recovered as executor of Sumboo in trust as to a share for the benefit of the plaintiffs, who were the sons of his brother Hurrish.

Now both Courts have found that no adequate consideration was given for the

* From the judgment of Norman and Levinge, JJ., —when sitting in appeal from ordinary original civil jurisdiction,—dated 7th September 1864.

Digitized by Google

purchase. It therefore appears that there was a sale of the interest of the plaintiffs for an insufficient consideration to Juggut Chunder, who held in a fiduciary character for them. According to the rules of equity, that sale cannot stand as an absolute sale, but Juggut Chunder is bound to return the share of the plaintiffs in that estate upon receiving back the purchase money which he gave for it.

The youngest son of Sumboo, Sreeman Chunder, was also made a defendant in the suit. Sreeman Chunder is said to have been a party to the purchase by Juggut Chunder. He says that Juggut Chunder purchased the decree for the benefit of himself and Sreeman Chunder jointly. But if Juggut Chunder, holding the decree in a fiduciary position, could not purchase it for himself, could Sreeman Chunder employ Juggut Chunder, who held the decree in a fiduciary position, to purchase that decree for the benefit of himself and Sreeman Chunder jointly? It appears to their Lordships that the same objection would apply to Juggut Chunder's purchasing for himself and Sreeman jointly as there would be to his purchasing for himself alone. One of the reasons for setting aside transactions such as this, is, that the purchaser is presumed from his position to have better means than the vendor has of ascertaining the value of the property purchased. Well, then, if a person, knowing that another holds a fiduciary position, and has a better knowledge of the value than the vendor, employs that person to purchase for him, and the trustee purchases secretly in his own name for the benefit of that other, it appears to their Lordships that the sale is equally invalid against the person for whose benefit it is purchased by the trustee as it would be against the trustee himself; therefore it was not necessary in this suit to file a bill to set aside the sale merely as to half the estate as against Juggut Chunder, and to allow it to stand as to the other half for the benefit of Sreeman Chunder. If it became necessary to investigate the evidence, there does not seem to be sufficient to show that Sreeman Chunder actually advanced any part of the purchase-money, or was really interested in the purchase.

The decree having been obtained by Juggut Chunder, the property of Sib Chunder's representatives was put up for sale by the sheriff in execution, and a portion of the property so put up was purchased under the decree, but Juggut Chunder did not actually pay money for the property which he so purchased. The price of that portion of the property which was sold in execution of the decree was credited to the decree, and only the balance remained due. Then Juggut Chunder held the balance of the decree, and also the property which he had purchased and paid for with the other portion of the decree, in trust as to one-fifth share for the benefit of the plaintiffs. It was shown that Juggut Chunder re-sold portions of the property which he purchased at the sale under the decree for very much larger sums of money than those for which he purchased them. Both the lower Courts found, as a fact, that the 5,000 rupees which Juggut Chunder paid as the purchase-money of the share of the plaintiffs was an inadequate consideration. Their Lordships would not disturb the finding on the question of value unless there was the clearest evidence to satisfy them that an adequate consideration was given for the property; but, so far from that appearing to be the case, their Lordships are satisfied that the Lower Courts came to a right conclusion in finding that there was an inadequate consideration.

Then it is contended that this suit cannot be maintained, inasmuch as a suit had been brought against Mohes Chunder, as one of the executors of Hurrish Chunder, for administration of the assets of his estate; and it is said that this suit is in the nature of a bill of review of the decree which was given in that suit, or that it is in the nature of a supplemental bill, or of a bill in aid of that decree. But it appears to their Lordships most clearly that that is not so, when they come to look at the nature of the two suits. The administration summons, which may be treated as a suit, was to compel Mohes Chunder to account for the monies which he had received as executor of Hurrish Chunder. It is true that in the affidavit, and also in the petition which was filed in order to obtain that summons, it was alleged that Mohes Chunder, as the executor of the will of Hurrish Chunder, "had relinquished all "claims to the decree for Rs. 1,70,000, by "executing the said deed of assignment for "the sum of Company's Rupees 5,000 only, "and thereby had occasioned a loss to the "plaintiffs of the balance of Company's "Rupees 23,333." That was alleged in the petition; but it is clear that under a summons for an administration of the assets of an estate the executor could not be charged with negligence and wilful default. Accordingly the order which was made under that petition, referring the matter to the Master,

Digitized by Google

did not direct the Master to inquire as to whether more could have been made by Mohes Chunder if he had not been guilty of wilful default, but merely to take an account of the assets which he had received; and that is all that the Master did. He found what Mohes Chunder had received, and stated that there was a small balance due from him to the estate; but he did not enter at all into the question of whether Mohes Chunder had committed waste; nor could he, under the order which was made by the Court, have entered into that question. When the matter was brought before the first Court, Mr. Justice Morgan says:—"One "point made by the defendants is that the "same points have been raised by an admi- "nistration summons by the present plaintiffs "against the executor. The Master, how- "ever, properly declined to enter on an "investigation of this matter;" and the Master never did, nor did Mr. Justice Levinge, who made the order, direct the Master to enter into such an investigation. He could not, and did not, make such an order, and the matter never came before the Master at all.

Well, then, assuming that Mohes Chunder has been decreed to account for the 5,000 rupees which he had received from Juggut as the purchase-money of the estate, that circumstance would be no reason why the heirs of Hurrish Chunder should not have the purchase made by Juggut Chunder set aside upon returning the amount to him. The two causes of action are quite different. The present suit is not in the nature of a review of the decree which has been made against Mohes Chunder. It is a suit against Juggut Chunder as a purchaser in his own right, and not as executor of Hurrish Chunder. The other suit was against Mohes Chunder, to account for what he had received as executor of Hurrish Chunder.

It appears, therefore, to their Lordships that the Lower Court was right in declaring that the points raised by the administration summons, and the order and the reference to the Master, did not preclude the plaintiffs from bringing this suit against Juggut Chunder. It is true that Mohes Chunder was made a party to the present suit, but whether it was necessary or not is immaterial. Possibly this decree might have been obtained against Juggut Chunder without making Mohes a party; but Mohes did not object to being made a party, and he does not appeal in this case. He is made a respondent in this suit; he is not an appellant.

Their Lordships do not repudiate the authority of any of the cases which were cited by Mr. Cochrane. Admitting them to their fullest extent they are not applicable to the present case.

Mr. Justice Norman says, "I see no rea- "son why an account should not be taken "against one executor on one principle and "against another in respect of a separate "wrong committed by him or separate relief "sought against him." It appears to their Lordships that that remark is not applicable to the case. They have already pointed out that this is not a suit against Juggut Chunder as executor of Hurrish Chunder, nor for a wrong committed by him in that capacity. The relief to which the plaintiffs are entitled is upon the ground that the purchase which Juggut Chunder made was invalid, not because he was executor of Hurrish Chunder, but because he was executor of Sumboo Chunder, and as such executor held, for the benefit of Hurrish Chunder's heirs, the share which he purchased from Mohes Chunder as executor of Hurrish Chunder.

Under these circumstances their Lordships think that the Lower Courts came to a right decision, and they will therefore humbly recommend Her Majesty that the decree of the High Court be affirmed. As there is no party appearing on the other side, it will be without costs.

The 6th November 1874.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Diluvion—Re-formation

On Appeal from the High Court of Judicature at Fort William in Bengal.*

Hursuhai Singh and others

versus

Syud Lootf Ali Khan and others.

Where land which has submerged re-forms, and can be identified as having formed part of a particular estate, the owner of that estate is entitled to it.

THEIR Lordships, considering the turn that the argument has taken, do not think

* From the judgment of Bayley and Pundit, JJ., in Regular Appeal No. 401 of 1865, dated 4th June 1866.

Digitized by Google

it necessary to go at any length into this case. The suit was brought by the appellants, the proprietors of Mouzah Muteor, in Tirhoot, against the respondents, the proprietors of Mouzah Ramnuggur, to recover the possession of a large quantity of land which had been submerged by the river Ganges. It appears that the river flowed between the estates of the plaintiffs and the defendants, and in its course between the two estates there were from time to time various changes. There were two or three defined channels, which at times the river overflowed, and formed a pool or lake. The land which is the subject of the present suit was submerged, and when it first became free from water and reappeared, it adhered to and adjoined the estate of Ramnuggur, and, *primâ facie*, the accretion was to that estate; but upon an inquiry made by the Judge of Patna, who went to the spot, heard evidence, and took great pains to survey the district, he came to the conclusion that the submerged land, although it had reformed close to Mouzah Ramnuggur, was, in point of fact, land which belonged to Mouzah Muteor, and that there were means by which he could identify, and did identify, the land as having been, before its diluviation, part of that mouzah. He found those facts, and applying the law as he understood it to the facts, namely, that when submerged land can be identified upon its reappearance as belonging to a particular estate, the proprietor of that estate is entitled to it because in truth he had never lost the land, the land was always his, and the difficulty of identification being removed by evidence—the land being in fact identified—there was no reason why the property should not be regained by him. He acted upon this principle of law, which had been at that time affirmed by the High Court of Calcutta in a case in which Sir Barnes Peacock, with two other Judges, had given the judgment. That, however, was the judgment of a Division Bench; and the High Court, upon appeal in the present suit, decided that they were bound by a subsequent decision of a Full Bench of the High Court, which had come to a contrary conclusion, and had held that land which reappeared under circumstances like the present, must be held to belong to the proprietor of the estate to which it had apparently accreted; and they remanded the cause to the Judge of Patna, who, without altering his finding on the facts, decided according to this view of the law, and his judgment was, as might be expected, upheld by the High Court in the judgment now under appeal, on the case again coming before it upon the appeal of the present appellants.

The question of law involved in these decisions, which is a very important one, was brought before this Committee, in a case of Lopez *v.* Muddun Mohun Thakoor, 13 Moore, I.A., 467,* in which the principles which should govern cases of this description were very fully discussed and elucidated, with the result that it was laid down by the authority of this Committee that where land which has been submerged reforms, and can be identified as having formed part of a particular estate, the owner of that estate is entitled to it. It is admitted by Mr. Leith, the Counsel for the respondents, that the authority of this case, and others which have followed it before this Committee, cannot be disputed. Their Lordships think the principles laid down in those cases are perfectly correct, and are distinctly applicable to the present; and that, if the facts are to be taken as they were found by Mr. Justice Ainslie, the judgment below must be reversed. Their Lordships, for the reasons they gave during the argument, think it is impossible those facts could be disputed with any effect at their bar, and therefore both law and fact are in favor of the appellants.

Mr. Leith endeavoured to distinguish between the lands which were the permanently settled lands of Muteor and some lands which had been in themselves an accretion, and which were temporarily settled only with the proprietor of Muteor. Their Lordships think, however, that this distinction cannot prevail. There is evidence from which it may be presumed that those lands accreted to the estate of Muteor, and it may be inferred from the mode of accretion that the Government settled with the proprietor upon the ground that they had so accreted, and therefore that he was entitled to the settlement.

On these grounds their Lordships think that the judgment of the High Court must be reversed, and they also think that the decree originally made by the Judge of Patna before the remand is the correct decree. They find there is no formal petition of appeal against the decree of the High Court which remanded the suit, but this judgment ought not to be allowed to stand in the way of the proper decree to be made in the cause, and will be nullified by the course their

* W. R., P. C., 11.

Digitized by Google

Lordships propose to take, viz., humbly to advise Her Majesty to reverse the judgment of the High Court now under appeal, and the second judgment of the Zillah Judge, and to direct a decree to be made in the suit to the effect of the original decree of the Zillah Judge. The respondents must pay the costs of the litigation in India, and of this appeal.

The 24th November 1874.

Present:

The Hon'ble J. B. Phear, *Judge.*

Lease—Forfeiture—Construction.

Case No. 525 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 20th January 1874, *reversing a decision of the Additional Moonsiff of Moonsheegunge, dated the 5th July* 1873.

Ram Nursingh Chuckerbutty and others (Plaintiffs) *Appellants,*

versus

Dwarkanath Gangooly and others (Defendants) *Respondents.*

Baboo Kalee Mohun Dass for Appellants.

Baboos Gopal Lall Mitter, Doorga Mohun Dass and *Bama Churn Banerjee* for Respondents.

A condition of forfeiture should not be extended beyond the words in which it is expressed; unless, perhaps, it is impossible without so extending it to give a reasonable construction to the instrument in which it appears.

I THINK that sitting here as I do now on special appeal, I ought not to disturb the decision of the Lower Appellate Court.

The facts of the case are thus very shortly stated by the Subordinate Judge:—"It appears that in 1229 B. S., the ancestor of the plaintiff leased out the disputed land, which is a very small piece of land adjoining to the bastoobarry of the defendants, and the lease was in the name of Puddo Lochun alone. But the two brothers of Puddo Lochun who were joint in property and family continued to be in possession of the land. In the like manner, the heirs of Puddo Lochun, with the sons and heirs of his two brothers, have been in possession. Soon after the members of the family having increased in number, the sons of Puddo Lochun for sake of convenience having left their sister's sons to enjoy their share in the bastoobarry, removed to some other place, and the sons and heirs of the two brothers of Puddo Lochun are still in their original residence."

It must be added that the suit is brought by the lessors against not only the sons and heirs of the two brothers of Puddo Lochun, who are still living in the original residence, but also against the direct heirs of Puddo Lochun himself. And these latter assert in defence that the property is theirs, and that the other defendants are in possession thereof with their leave and license.

On these facts, and the evidence in the case, the Subordinate Judge has raised the inference of fact that the original pottah was intended by the lessors to be for the benefit jointly of Puddo Lochun, who was alone named as lessee, and his brothers who were jointly in possession of the baree with him. I am not prepared to say that there is any error of law in this conclusion of the Subordinate Judge. The words of the lease, no doubt, if construed strictly, must be taken to mean that the lease was granted to Puddo Lochun himself alone and his immediate personal heirs. But the circumstances of Hindoo society and the mode in which Hindoo property is so commonly held in this country, may very properly justify the conclusion which the Subordinate Judge has drawn from all the facts of the enjoyment of the property under the lease, namely, the conclusion that notwithstanding the narrowness of the words of the lease itself it was intended to operate in favor of Puddo Lochun and his brothers who were living with him. But it seems to me that on this appeal it is not necessary for me judicially to determine this question. The lease undoubtedly according to its terms operates in favor of those of the defendants who are the direct descendants of Puddo Lochun, and they cover, if necessary, the other defendants with the protection of their leave and license. This being so, the only question that is left in the case is the question whether the condition that appears in the lease has the effect on the facts, and in the events which have occurred of putting an end to the lease altogether.

The Lower Appellate Court has not in express words stated that it has given attention to this point. But the first Court says:—"It has been said that the plain words of the pottah indicate that the grant would fail on Puddo Lochun leaving

Digitized by Google

"his baree. It was not the intention of "the grantor, that it would also fail on "Puddo Lochun's son and grandson leaving "their baree. I think this argument is not "sound. The grant was made to Puddo "Lochun for ever with a certain condition. "I do not think it was intended that the "grant should fail if the actual grantee "leave his baree, but if his descendants are "entitled to leave that baree, the grant "would not be affected. It appears that "this bit of land was made over to Puddo "Lochun to make it the outer compound "of his baree, and that as it would not be "of much use if the baree be forsaken, the "above condition was introduced in the "potiah. I think as the grant was to "Puddo Lochun, his sons and grandsons, "the condition was also intended to be ap-"plied to Puddo Lochun, his sons and "grandsons, although the words sons and "grandsons were not used in reciting the "condition."

In other words, the condition of forfeiture in terms applies only to Puddo Lochun, but in the opinion of the Moonsiff must be extended to Puddo Lochun's descendants, otherwise the intention of the condition will be frustrated. The condition has been read out to me in the original, and has been translated also by the learned pleaders on both sides, and I think it is quite plain that the words of it apply only to the event of Puddo Lochun leaving the baree. Then it seems to me that the Moonsiff is wrong in the principle upon which he has extended the operation of the condition. It is, I conceive, a well known rule of Courts of equity that a condition of forfeiture should not be extended beyond its words, unless, perhaps, it is impossible to give a reasonable construction to the instrument in which it appears without doing so. And there might in this case be many reasons suggested why the lessor should, when making a condition of this kind, confine it to Puddo Lochun himself. Moreover, an indefinite condition which might rise into operation at any distance of time beyond the period of the grant, would be, I take it, clearly repugnant not only to the principles of Hindoo Law but also to those principles of equity which govern English Courts. On the whole, it appears to me that the Moonsiff was wrong in considering that this condition of forfeiture was such as to come into operation upon the events which have occurred, *i. e.*, not the event of Puddo Lochun leaving the baree, but the event of his sons or descendants leaving the baree. In this view, I think that the lease is still in full operation and effect, and that therefore, as I have already said, the suit must fail not only against Puddo Lochun's direct descendants, but also against the other defendants who, to say the least, are entitled to occupy the baree under cover of leave and license of the first holder.

The appeal must be dismissed with costs.

The 24th November 1874.

Present:

The Hon'ble J. B. Phear, *Judge.*

Rent-suit by Co-sharer—Act VIII (B. C.) 1869 s. 102—Charter Act s. 15.

Case No. 565 of 1874.

Special Appeal from a decision passed by the Officiating Additional Judge of Twenty-four Pergunnahs, dated the 4th December 1873, reversing a decision of the 2nd Moonsiff of Satkhira, dated the 23rd January 1873.

Mokhoda Soonduree Dassee (Plaintiff) *Appellant,*

versus

Kureem Shaikh and others (Defendants) *Respondents.*

Baboos Hem Chunder Banerjee and *Kalee Mohun Dass* for Appellant.

Baboo Mohinee Mohun Roy for Respondents.

A suit by a sharer in a talook against a ryot for an aliquot part of the rent, wherein plaintiff made her co-sharers defendants, as they had resisted her right to have any share of the rent at all, should be treated as a suit on behalf of all the share-holders collectively.

Where a suit of this nature, in which the rent claimed was Rs. 7 odd annas, had been decreed in plaintiff's favor by the first Court, but was dismissed by the Lower Appellate Court as not maintainable, it was held that although the Lower Appellate Court expressed no opinion as to the rights of the parties, yet the decree had determined questions between parties having conflicting claims to an interest in land within the words of the Rent Law s. 102.

Where such a case so dismissed came up to the High Court in special appeal, and the respondent was not placed in a disadvantageous position in regard to answering the complaint, the Court felt bound to exercise the power vested in it by the Charter Act, s. 15, and ordered the Lower Appellate Court to try the case on its merits.

THE judgment of the Lower Appellate Court is short, and as it seems sufficiently to set out

Digitized by Google

the facts of the case I will read it in full. It runs as follows:—"This suit has been "brought for arrears of rent by a 4-anna "sharer in the talook against a ryot hold- "ing a jumma of Rs. 45, for her separate "proportion of the rent to which defendant "was liable for the year 1278 B. S.

"The plaint sets out that defendant holds "a jote at the rent stated, that up to 1278 "B. S. plaintiff jointly with the other "sharers employed a single gomashtah, who "collected the rents and divided them after- "wards among the proprietors according to "their respective shares.

"Now, the first question the Moonsiff "should have considered was whether a suit "of the kind would lie. The current of deci- "sions in the High Court for some time back "has been that a sharer cannot sue a ryot "separately for his proportion of the rent, "unless there has been an express agreement "to that effect on the part of the ryot. The "Moonsiff has relegated the question to the "2nd last paragraph of his judgment, and has "there dealt with the subject in a very inade- "quate manner. He appears not to recognize "the fact that the rule is for the protection "of the ryot, who would otherwise be liable "to have his rent split up into infinitesimal "fractional portions, and have to spend half "his time looking for his landlords. The "Full Bench decision of the High Court, 17th "April 1871, in the case of Indur Chunder "Doogur, No. 1798 of 1870, page 21, Weekly "Reporter, Volume VI, lays down the law "on the subject, and had it been followed by "the Moonsiff in the present instance this "suit would have been dismissed at once.

"From the wording of the plaint, it is "perfectly apparent that the ryot has never "agreed to pay separately to the several "proprietors, nor in fact done so. The allega- "tion in the plaint of his having paid rent of "the Rs. 11 odd due for 1278 B. S. to "plaintiff separately, is, I have no hesitation "in saying, a mere falsehood asserted to "attempt to evade the force of the late deci- "sions. On the simple ground, then, that "the plaintiff is only a sharer and cannot "sue separately for her proportion of the "rent from the ryots, I decree this appeal "with costs."

The Judge has here omitted to state that, although the plaintiff sued alone to recover a share only of the rent due from the ryot defendant, yet she made her co-sharers co-defendants, and that these co-defendants resisted her right to recover in this suit.

It appears that it was an issue between the parties in the first Court whether or not the plaintiff was entitled to receive any share of the rent. The plaintiff maintained that she was, and she complained that the ryot defendant had not paid this share. This issue was decided by the Moonsiff adversely to the defendant. The Judge refuses to go into the merits of the case at all as it was laid before the first Court, on the simple ground that as the plaintiff is only one sharer out of several co-sharers, she cannot sue separately for her proportion of the rent due from the ryot.

It appears to me that the Judge misapprehended the doctrine which the Full Bench decision quoted by him affirmed and which had been repeatedly laid down and acted upon by Division Benches of this Court before that decision was passed. It is true that the long current of decisions has been to the effect that each sharer of rent has no right, independently of his co-sharers, to bring a suit against a ryot for his aliquot part of the rent, unless he can place his suit upon the ground of a contract on the part of the ryot to pay him that part separately from the rest. And the Judge is quite right in supposing that this rule of law is dictated in a very large degree by consideration for the ryot. It has the effect, as the Judge remarks, of protecting him from having his rent split up into infinitesimal fractions and from being sued by each one of the shareholders separately for each fraction.

But this suit, as the plaintiff has brought it, is very different from any thing that the rule was directed against. In truth it is difficult to understand how the plaintiff could obtain any remedy for the wrong of which she complains if the view of the Judge is correct. In the present instance it is plain, even if the plaintiff does not say so in express words, that she could not get her co-sharers to sue with her. They resisted her right to have any share of the rent at all. And the only mode in which she could get the question at issue between herself and her co-sharers and the ryot decided by a Court of law was that which she has adopted, namely, to make her co-sharers defendants as well as the ryot from whom she sought to recover the rent. A suit of this kind protects the ryot from being sued again. The suit of the plaintiff thus brought as against the ryot is, or should be treated as, a suit on behalf of all the shareholders collectively, although she stands alone as the plaintiff. The question whether the

Digitized by Google

ryot had paid the whole of the rent due to all the co-sharers jointly or not, could be and ought to be decided in a suit of this kind once for all; and the decision of this suit, if the issues were properly framed, would be an answer to any claim which might be made against the ryot by any of the co-sharers in another suit. The Judge, as I have already mentioned, has deliberately refused to try the matter which was thus brought before the Court. And it appears to me that he is wrong in law on this point.

Two objections have been made on behalf of the respondent to my entertaining this appeal. The first is that if the decree of the Judge is a decision *inter partes* on the merits, then the case falls within Section 102 of the Rent Law; and inasmuch as the amount of the rent is only Rs. 7 odd, and as the judgment of the Judge does not determine any question of right to enhance or to vary the rent of a ryot, or any question relating to title to land or to some interest in land as between parties having conflicting claims thereto, therefore this Court has no jurisdiction to entertain this suit.

The other objection is that if this decree be not operative as a decision *inter partes*, but the Judge has by his judgment simply declined to entertain jurisdiction in his Court, then the proper remedy cannot be applied on an appeal of this kind.

It seems to me that as the case now stands it probably would be dangerous to treat the decree of the Lower Appellate Court as not operative upon the rights of the parties. The Lower Appellate Court is a Civil Court competent to determine all questions of civil rights between the parties before it, and unquestionably upon the footing of the plaint and the written-statement, more than one issue of right between the plaintiff and some of the defendants, involving conflicting claims to property, arose. These were determined in favor of the plaintiff by the first Court; and the decree of the Lower Appellate Court by dismissing the suit, if it stand unqualified, must have the effect of deciding them against her. If this is so, although in the judgment itself there is no expression of opinion on the part of the Judge as to the rights of the parties, yet the decree has, within the latter words of Section 102 of the Rent Law, determined questions between parties having conflicting claims to an interest in land. But even if this view be not correct, I think I ought, in a case of this kind, to exercise the jurisdiction which is reposed in this Court by the 15th Section of the Charter Act. The Judge ought, in my opinion, to have entertained this suit and decided it between the parties upon the merits. It is true that the appellant has not in terms asked for special interference of this Court upon the footing of Section 15 of the Charter Act, but she has asked for a remedy which this Court can give by an exercise of the power which is conferred upon it by that Section. And unless the mode in which the matter is brought before this Court is such as to place the respondent into a disadvantageous position in regard to answering the petitioner's complaint, it appears to me that there is no reason why that power should not be exercised upon this occasion. Of course, if upon the petition of the plaint and the written statement and the judgments of the Lower Courts, I could not see facts which would justify the exercise of the extraordinary power of the Court, I should be in duty bound to refuse to interfere, leaving the petitioner, if she chose, to make an entirely independent application on the subject. Again, on the other hand, if I had any reason to suppose that the respondent had not had any fair opportunity of meeting the facts which have been disclosed in the pleadings and in the judgments of the Lower Courts, I ought to abstain from interfering now, and so afford him time to answer the application of the petitioner when it should be made in another shape. On the whole, however, there does not appear to be any reason why I should refrain from dealing with the case as it stands. The facts found by the Lower Courts are very plain and distinct: they are indeed relied upon by the respondent himself, and he does not desire to add any thing to them. As I understand those facts and the course taken by the Lower Appellate Court, it seems to me plain that the Judge has been entirely wrong in refusing to consider and determine this case upon its merits. And that being so, it is the duty of this Court to put him right.

On the whole, I think the decision of this Court ought to be that the decree of the Lower Appellate Court be reversed and the case remanded to that Court for trial upon its merits.

The costs of this appeal will abide the event.

Digitized by Google

The 3rd December 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Decree-holder—Costs.

Case No. 236 of 1873.

Regular Appeal from a decision passed by the Subordinate Judge of Tirhoot, dated the 28th July 1873.

Ajoodhya Doss (Defendant) *Appellant,*

versus

Muthoora Doss (Plaintiff) *Respondent.*

Baboo Hem Chunder Banerjee for Appellant.

Baboos Chunder Madhub Ghose and *Aubinash Chunder Banerjee* for Respondent.

A suit by A having been decreed and execution proceedings taken out, the judgment-debtor paid into Court the amount decreed. Subsequently the decree-holder (A) and his cousin (M) put in a petition intimating that the money belonged to them in equal shares, and the Court afterwards held a proceeding in the presence of the Vakeels of both parties and informed A's Vakeel that no steps had been taken by his client to take out the money and that the name of M had been registered with that of A as decree-holders, and the money was available for payment on their joint application. Eventually M sued A for a moiety of the amount. The Subordinate Judge, holding that it was entirely owing to the passive opposition of A that the money could not be drawn out from the Court, decreed the claim with costs.

HELD that the decision of the Subordinate Judge was correct and just.

Kemp, J.—THE point involved in this case is a very simple one, and depends upon whether the Subordinate Judge of Zillah Tirhoot has exercised a wise discretion in awarding costs in this case. The defendant and the plaintiff are cousins, and it appears from the proceedings in the Court below that their *karbar* was jointly carried on. A decree was obtained against one Baboo Gridharee Singh by Baboo Ajoodhya Doss, the defendant in this case, alone. Execution proceedings were taken out by Baboo Ajoodhya Doss, and the judgment-debter paid into Court the sum of Rs. 53,950-14-10 in full satisfaction of the decree. Subsequently, the two cousins, the plaintiff and defendant, presented a petition to the Court intimating to the Court that the money so paid in belonged to them in equal shares, and the Court on the 20th of May 1873 held a proceeding in the presence of the vakeels of both parties; the vakeel of Baboo Ajoodhya Doss being Baboo Oomesh Chunder Roy, who has been examined in this case. The vakeel of the defendant Baboo Ajoodhya Doss was informed that the money had been paid in, but that no steps had been taken by his client up to that date, namely, the 20th of May, to take out the money from the Court; that it appeared that Ajoodhya Doss and Muthoora Doss had presented a petition to the effect that they were entitled to draw this money in equal shares, and that the name of Muthoora Doss had, on the strength of this application, been registered with the name of Baboo Ajoodhya Doss as decree-holders; and the Subordinate Judge evidently shrinking from the responsibility of paying out such a large sum of money as Rs. 53,950-14-10 except on the joint receipt of the two cousins informed the pleader of the defendant Ajoodhya Doss that the money was available to the parties on their both applying to take out the money; that the moiety of the money could not be paid to Muthoora Doss contrary to the terms of the decree; and that if Ajoodhya Doss would not join Muthoora Doss in taking out this money, the *jowabdihee* or responsibility would be with him Ajoodhya Doss. Subsequently to this order, it is in evidence in the deposition of Baboo Oomesh Chunder Roy who was not cross-examined in any way by the pleader for the defendant, that he frequently asked his client Baboo Ajoodhya Doss to take out this money, but that Ajoodhya Doss would not give him any decisive answer. It appears then that the plaintiff was advised to bring this suit, and he therefore sues to recover the half of this sum of Rs. 53,950 with interest from the 20th of May 1873, the date of the Subordinate Judge's order to date of suit with costs.

The answer of Ajoodhya Doss is to this effect that he had no objection to the plaintiff drawing out this money and that he had never made any objection to his doing so, that the suit was an unjust one, that the plaintiff was not entitled to his costs, and that the Court ought to award costs to him, the defendant Ajoodhya Doss. The Subordinate Judge, Baboo Grish Chunder Ghose, says very properly that the issue is a very simple one, and all that he had to consider was whether the plaintiff is to be reimbursed

Digitized by Google

in so far as costs and interest are concerned in this case. The Subordinate Judge held that it was owing entirely to the passive opposition of Ajoodhya Doss that this money could not be drawn out from the Court, and although he would not award interest he has awarded to the plaintiff the costs of the suit. These costs amount to Rs. 1,560. Therefore we have in this appeal simply to consider this question whether the Court below has exercised a wise discretion in awarding these costs. We think that looking to the distinct terms of the order of the 20th May 1873 to the effect that Baboo Ajoodhya Doss would be responsible if he did not join his cousin, the plaintiff, in drawing out this money, and also looking to the evidence of Baboo Oomesh Chunder Roy, the vakeel, whose respectability and trustworthiness are not in any way questioned, it was entirely owing to the opposition, to say the least of it, of Baboo Ajoodhya Doss that Baboo Muthoora Doss was kept out of his money and has not got interest on it; and we think, looking to the whole circumstances of the case, that the decision of the Subordinate Judge is a correct and just decision.

During the course of the argument Baboo Hem Chunder Banerjee who appeared for the defendant Ajoodhya Doss, called the attention of the Court to Section 230 of the Code of Civil Procedure. There can be no doubt that under that Section where one or two decree-holders apply for execution of a decree the Court can in its discretion put the parties to terms, that is to say, direct them to give security or call upon the other side to show cause why the decree should not be executed, and the Court can then execute the decree on the application of one of the parties only. This Section does not apply to the present case. Baboo Ajoodhya Doss was the sole decree-holder, and there was a petition by the parties to this suit that they were to take out this money in equal shares, but so far as the judgment-debtor was concerned the decree-holder was Ajoodhya Doss alone. Ajoodhya Doss was informed that the money was available, and that there was nothing to prevent the money being taken out on the joint petition of himself and his cousin; and he was warned that if he threw any obstacles in the way of Baboo Muthoora Doss drawing out his share of the money, the responsibility would be with him.

Under these circumstances, as already stated, we think the decision of the Lower Court a just one and we dismiss the appeal with costs.

The 4th December 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris *Judges.*

Mesne Profits—Personal Experience of Judges—Evidence.

Case No. 2673 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Bhaugulpore, dated the 21st August 1873, affirming a decision of the Subordinate Judge of that district, dated the 21st February 1873.

Kishen Pershad Singh (Plaintiff) *Appellant*

versus

Mr. L. G. Crowdy (Defendant) *Respondent.*

Baboos Mohesh Chunder Chowdhry and *Rajendronath Bose* for Appellant.

Mr. M. L. Sandel for Respondent.

In estimating mesne profits for a period of wrongful dispossession, the Lower Courts were held to have pursued an incorrect course in deciding upon the supposed personal experience of the Judges instead of upon evidence laid before them. The Court ought to have done its best to estimate from the evidence before it what would have been the net profits which the dispossessed owner would have earned by the cultivation during that period, had he been in possession.

Phear, J.—THE Subordinate Judge in his judgment thus describes the situation of the parties:—

"The plaintiff is a tenant cultivating 25 "beegahs of land situated within the one "annua and 16 gundas putti of Mouzah "Goodourgawun, Pergunnah Ballia. The "defendant ousted him and sowed indigo "for the factory. The plaintiff obtained a "decree for possession of 25 beegahs in his "cultivation, dated the 23rd February 1871, "from the Jumooe Moonsiff's Court, and the "appellate Court's decree, dated the 27th "June 1871; and the present suit refers to "the wassilat of the aforesaid land for full "two years 1277 and 1278 F. S., and for the "bhadooe crop of 1279 F. S."

He then states certain facts with reference to the defence, and eventually he says:—"The average estimate of the produce to be "adopted in this case is the following, that "the plaintiff was deprived of his holding "during the years in suit; if he had continued "in possession of his holding what profit "would he have been deprived of? In other "words, this wassilat should be determined

Digitized by Google

"according to the actual capability of the "soil."

After stating this proposition which, as we understand it, is no doubt substantially correct, he goes on to add :—"As the defend- "ants do themselves admit having entered "into engagements with tenants in respect "of this land at Rs. 3 and 2-8 on the second "year, it does fully prove that the disputed "land is of a superior class of soil, but there "is also no doubt that the plaintiff has "exaggerated the produce too much, because "25 beegahs of land can never yield such "an enormous produce that a claim relating "to the produce of two years would come up "to Rs. 2.000, and the estimate of the "produce of the 25 beegahs of land at 15 "maunds of wheat per beegah, besides two "maunds of ranichee and one maund and "20 seers of tishee, is highly improbable. "The following account of the produce "seems to me correct."

This account is given in certain items, and amounts to a total of Rs. 750-8 annas 4 pie. Then the Subordinate Judge says—"Deduct "half expenses incurred by the tenants on "account of rent, coolies, fodder for plough "cattle, &c, Rs. 375-4-2, balance Rs. 375-4-2." Then he proceeds—"The defendants admit "the sum of Rs. 360 as having been settled "by adjustment, and my account also nearly "comes up to that amount, the difference "being only Rs. 15 : hence my account which "is drawn up according to my own experience "in sundry law suits of this nature should "be accepted by the defendant, and the "plaintiff cannot also but accept it because "if after deducting the expenses, &c., the "sum of Rs. 375-4-2 be awarded as "wassilat, the produce of 25 beegahs of land "per annum exceeds Rs. 6 per beegah, and "the tenants do not in the general run "evidently earn more than Rs. 6 per beegah "after meeting all expenses, &c. The "account given by the plaintiff of the wheat "and jakari produce &c. is quite absurd. "Only the opium and sugar-cane cultiva- "tion can yield Rs. 40 per beegah: hence "only Rs. 375-4-2 is deemed sufficient. The "enquiry made in the case of Indur Roy "cannot govern this case."

So that the Subordinate Judge, in fact, puts on one side all the evidence which the plaintiff adduced in support of his allegations, because in his opinion these allegations were extravagant and the evidence (we suppose) could not be trusted to its full extent. Having done this, he made an estimate of the probable amount of wassilat founded upon his own experience in sundry law suits of a similar nature.

The plaintiff appealed to the Judge complaining of this mode of decision. The Lower Appellate Court, however, accepted the opinion of the first Court. The Judge says —"The Subordinate Judge, holding that this "was an exaggerated claim and disbelieving "the evidence brought to establish it, made "rough calculation of the amount which "might have been gained from the land had "it been in the possession of the defendant.

"The plaintiff appeals on the ground that "the Subordinate Judge has disregarded the "evidence. It appears to me that, when the "evidence went to support a claim so "monstrous as that put forward by plaintiff, "the Subordinate Judge was fully justified "in falling back on his own experience, and "curtailing the demand so as to make it "consistent with every day common sense.

"There has nothing been urged in the "appeal which at all tends to support or "explain the plaintiff's unusual demand.

"Agreeing in the estimate made by the "Subordinate Judge, this Court directs that "the appeal be dismissed."

From this we gather that the Judge treated the case pretty much in the same way as the Subordinate Judge did, that is, he put the evidence which the plaintiff had adduced entirely on one side, and directed his attention solely to consider whether the estimate of the Subordinate Judge come to as if he was a professional expert in the matter who had not seen the ground, appeared to be in itself a reasonable estimate or not.

Both the Courts have thus decided the case upon the supposed personal experience of the Judges instead of upon evidence laid before them. We need hardly say that this is not a correct course to pursue : the Courts were bound to take the evidence of the one side and of the other for so much as it was worth, and do the best they could do to form their judgment upon it. Of course, if the evidence adduced by the plaintiff to support his allegations as to the amount and value of the produce was untrustworthy, they would not give effect to it in its full extent ; if it was such that they disbelieved it altogether, they would be justified in disregarding it entirely, and giving the plaintiff nothing more than a nominal sum. But it can hardly be supposed, if the witnesses were even tolerably well examined, that the evidence taken, even though it could not be to its full extent relied upon, should not have afforded the Court some clue to the average produce of the land.

Digitized by Google

The judicial decision at which the Courts eventually arrived ought to have been based upon materials in the shape of evidence, such as they were, which the parties produced before the Court. For this reason alone, we find it necessary to reverse the decision of the Lower Appellate Court, and remand the case for retrial.

But there is another reason, as it seems to us, why this course must be taken, namely, that the Subordinate Judge has, we think, dealt wrongly with the question of the expenses incurred by the tenant in cultivation. Although the Subordinate Judge has rightly sketched out the principle which ought to govern this investigation, yet he has adopted, so far as we can see, an entirely arbitrary mode of arriving at the costs which the tenants must be supposed to be at in producing the crops. It was the duty of the Court to endeavour as best as it could to put the plaintiff in the same position as he would have been in had he been allowed by the defendant during the two years in question to have had quiet possession and cultivation of his land. In other words, the Court ought to have done its best to estimate from the evidence before it what would have been the net profits which the plaintiff would have earned by the cultivation of his land during that period, had he been in possession. And in so doing, inasmuch as the defendant was admittedly a wrong-doer and the plaintiff had been turned out of his cultivation without cause, the Court would be right in being liberal towards the plaintiff when forming an estimate of these profits. And for the purpose of getting at the net profits, two steps have to be taken: the Court must, in the first place, endeavour to ascertain the amount of the gross profits, and next the probable amount of the cost necessary to be incurred in obtaining those profits. But there can hardly be any doubt that simply by way of guess to cut off one-half of the rough profits is not the proper way of attaining this last object, nor indeed is it likely to lead even to an approximately true result. Moreover, rent ought not to have been involved in the item of expenses. If the defendant would have been entitled to be paid rent for this land during the period in question by the plaintiff had the latter been allowed to continue in undisturbed possession, then the defendant might, perhaps according to the circumstances of the case, be allowed to set off that amount against the damages which he otherwise would have to pay to the plaintiff. But it is not stated in either judgment as a fact that the defendant was entitled during these years to receive rent from the plaintiff, and neither is it said what the amount of rent was which the plaintiff was bound to pay to any one for the land. If he was bound to pay the rent to any other person than the defendant, then he was entitled to have the money for that purpose paid to him by the defendant, and the equivalent sum ought not to have been deducted from his profits. It is the net profits of his land, after deducting the expense of cultivating it, which enables a tenant to pay his rent. Unless the plaintiff was bound to pay rent to the defendant, and unless under the circumstances of the case it was right to allow the defendant to set-off the unpaid amount of rent against the plaintiff's demand, the item of rent ought not to be deducted from the estimate of his wassilat, and even in that case only the actual amount of rent due should be so deducted. We are not in a position to say whether rent should or should not in this present case be deducted. That is one of the questions which the Lower Court has to determine between the parties. We confine ourselves, therefore, simply to reversing the decision of the Lower Appellate Court, and remanding the case to that Court for retrial.

The costs of this appeal will abide the event.

The 4th December 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Zur-i-peshgee (Usufructuary) Mortgage—Limitation.

Case No. 2427 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Patna, dated the 4th August 1873, *affirming a decision of the Moonsiff of Behar, dated the 25th January* 1873.

Syud Akbur Hossein and others (Plaintiffs) *Appellants,*

versus

Toolsee Ram and others (Defendants) *Respondents.*

Mr. C. Gregory and *Moonshee Mahomed Yusoof* for Appellants.

Mr. M. L. Sandel and *Baboo Mohesh Chunder Sandel* for Respondents.

In a suit to recover possession of Mouzah M., plaintiff alleged that the land had been given in *zur-i-peshgee*

Digitized by Google

mortgage to defendant No. 1 who opposed his re-entry after redemption. Defendant No. 2 who was in possession, pleaded that they were kharijee lands of a different mouzah, and had been in possession of himself and his ancestors for a number of years.

HELD, that as it was found that defendant No. 2 was not identical with the mortgagees, between whom and defendant No. 2 there was no collusion, plaintiff was barred by limitation unless he could show that he had been in possession within 12 years prior to the suit.

Kemp, J.—THE plaintiff, who is the special appellant in this case, sues two parties on the allegation that he, the plaintiff, was the malik of Mouzah Mukdoompore, that a settlement had been effected with his ancestors for that mouzah in the year 1794, corresponding with the year 1201 Fuslee; that on the 8th of February 1826, a mortgage of the aforesaid mouzah was granted to Khetter Raoot and others. This mortgage has been designated during the whole of the proceedings as an ijarah, but it appears that it was a zur-i-peshgee ijarah, tantamount to a mortgage. The term of the original lease was from 1235 to 1243 Fuslee. The plaintiff says that up to the year 1869, the mortgagees, the zur-i-peshgeedars, were in possession as it was not until the redemption of the property in 1869 that the plaintiff became entitled to re-enter; that on attempting to collect the rent of the disputed lands he was opposed by the defendants first party, the zur-i-peshgeedars or mortgagees, who alleged that the disputed lands formed a separate kullum under the designation of Arazee Kharizee Faizoollapore. The plaintiff, therefore, brings this suit alleging that this was a fraud on the part of the defendants, and that his cause of action accrued to him when he was opposed by the defendants in 1869. The Fureek Awul defendants, 1st party, the zur-i-peshgeedars, did not put in any written statement.

The Fureek Doohum, or defendants 2nd party, who are, as they state parties entirely independent of the zur-i-peshgeedars or mortgagees, allege that neither the plaintiff nor his ancestors have ever been in possession of the disputed property; that the suit of the plaintiff is barred; and on the merits they state that these lands have always been kharijee jumma lands; that they were never incorporated in the nizamut lands of Mouzah Mukdoompore; that a settlement of this property was made with their ancestor Ashkurum; that many years subsequent to that settlement, the Government attempted to resume these lands; that a resumption did take place; that a summary settlement was made with their ancestors, but that subsequently the land comprising an area of 100 beegahs was released to them in September 1839.

The first Court found for the defendants, and as the Moonsiff's decision has been adopted by the Officiating Judge of Patna, who does not think it necessary to give any reasons of his own, we have had the Moonsiff's decision read to us. We find it to be a very careful decision, and he finds that the suit of the plaintiff is clearly barred.

There has been considerable argument in this case before this Court, but we think that it is very clear that unless it can be clearly shown that the Fureek Doohum defendants 2nd party are identical with the mortgagees or zur-i-peshgeedars, Fureek Awul, their possession is clearly an adverse possession to the plaintiff. The suit was one for ejectment, and therefore as the defendants 2nd party distinctly pleaded that these disputed lands were kharijee lands belonging to Faizoollapore and not incorporated in the nizamut lands of Mukdoompore, that their ancestors and themselves have been in possession for a number of years, it is incumbent upon the plaintiff to show that he himself or some body through whom he claims was in possession of the disputed lands within 12 years prior to suit. Now the Moonsiff has found that the mortgagees and the defendants 2nd party, who are in possession, are not identical, and that there is no connection or collusion between these parties. It is, therefore, clear to us that the possession of the defendants 2nd party has been all along an adverse possession as against the plaintiff. On the question of fraud also, the plaintiff states that during the incumbency of the mortgagees, the defendants 2nd party in collusion with them and the kanoongoes set up this plea about these lands being the kharija lands of Faizoollapore, and that they did not discover this fraud until they re-entered into possession upon the redemption of the property. The Moonsiff has found that allegation to be false, and on the whole case we think that the questions of fact have been carefully considered by the Moonsiff, and as his decision has been confirmed by the Judge we cannot interfere in special appeal.

The appeal is dismissed with costs.

Digitized by Google

The 5th December 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Judgment-debtor's Assets—Liability of Security.

Case No. 740 of 1874.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Bhaugulpore, dated the 17th March 1874.

Nowab Syud Villayet Ali Khan (Decree-holder) *Appellant,*

versus

Shah Ameenooddeen Ahmed and others (Judgment-debtors) *Respondents.*

Mr. M. L. Sandel and *Moonshee Mahomed Yusoof* for Appellant.

Mr. C. Gregory for Respondents.

Where a judgment-creditor or decree-holder releases his deceased judgment-debtor's representative, into whose hands that debtor's assets have come, and exempts the property in question from execution, he cannot go against property which only became liable by way of security for the due payment of the debt by the principal debtor.

Phear, J.—THIS was an application for execution of a decree which was made on the 30th September 1872. In the schedule to the petition, the decree which was sought to be executed was described as a decree in favor of Villayet Ali Khan against several persons, the heirs of Maharanee Wazeerunnissa and others. The date of the decree was stated to be 10th May 1852 and 3rd February 1869. The parties against whom the execution was sought were named as follows:—"Leyakut Ali Khan for "self and as father and guardian of Mussa- "muts Wahidunnissa and Sharifunnissa, "minor daughters of Mussamut Muryum, "deceased, and Shah Ameen Ahmed, husband "of Mussamut Zamirun, heirs of Maharanee "Waziranissa, deceased."

The assistance which was wanted from the Court was said to be that:—"The decre- "tal money may be awarded and recovered "by the sale of 4 annas of Pergunnah "Khujra which is pledged in the decree."

And the petitioner prayed "that the suit "may be numbered, the principal amount "with interest and costs up to the day of "realization may be awarded by attachment "and sale of Mehal Khujra as described in "this talika. Out of 8 annas of 16 annas of "Mehal Khujra, Pergunnah Khujra, pledged "in security, the right and interest of Maha- "rance Wazeerunnissa, deceased, original "judgment-debtor, 3 annas 6 pie, the right "and interest of Rajah Hossein Buksh "Khan, one of the judgment-debtors, heir of "the said deceased having been exempted, "the remaining 4 annas 6 pie, the right and "interest of the deceased Maharanee, which "is in possession of the said judgment- "debtor, her heirs, bearing towjee No. 683 and "jumma Rs. 13 672-15-11 may be attached "and sold, and the decretal money may be "paid."

In answer to this application Haimood- oonnissa and the minors put in petitions. In the first place, the father and guardian of the minors, by the petitition which he filed on their behalf, said that they were not the heirs of Maharanee Wazeeroonnissa, that they were not in possession of any of her effects, that the property of the minors could only be held liable for the remaining amount of the decretal money which might remain due after the termination of proceed- ings against the principal debtor, because it was only liable if at all by reason of its having been made security for the satisfac- tion of the decree against him.

And the petition filed on behalf of Mussa- mut Hamidoonnissa by her husband was to the same effect.

It was conceded in the argument before us, and indeed is found as a fact in the judg- ment of the Lower Court, that the persons against whom execution is now sought are not the heirs of the original judgment-debtor, and have not in fact any assets of hers in their hands. But it was maintained that the ancestors of these persons had effectually pledged the property, which was now sought to be attached and sold, as security for the due payment of the decree against Wazeer- oonissa, and that it was on that ground liable to be taken in execution and sold. And it was said that Hamidoonnissa and the minors had admitted in their petition that it was liable by way of security. On the other hand, it was also beyond contest that assets of the deceased judgment-debtor had come into the hands of one Hossein Bux who was and is her representative; and that the judgment-creditor or the decree-holder had, as he himself states in this very petition of September 1872, released Hossein Bux or exempted the property in his hands from execution. This being so, it seems to us quite plain that he cannot go against the property of the petitioners which was not liable in the first instance, but only at most

Digitized by Google

became liable by way of security for the due payment of the debt by the principal debtor. And therefore it seems to us that the judgment of the Lower Court dismissing this application is a right judgment.

It is not under the circumstances necessary for us to say whether or not, had the decree-holder established a right to proceed against the pledged property, the proper mode of doing so would have been by way of prosecuting the execution proceedings in the original suit or by a separate suit.

We dismiss the appeal with costs.

The 7th December 1874.

Present:

The Hon'ble F. B. Kemp and E. G Birch, *Judges.*

Rent-suit—Payment in kind—Set-off.

Case No. 238 of 1873.

Regular Appeal from a decision passed by the Subordinate Judge of Tirhoot, dated the 7th July 1873.

Roy Nundeeput Mohatoon Bahadoor (Defendant) *Appellant,*

versus

Mr. W. Stewart (Plaintiff) *Respondent.*

Mr. C. Gregory for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

In a suit for arrears of rent where defendant pleaded that under an arrangement between him and plaintiff's ancestors, payment had been made by him in cash or in kind, and asked for an account to be taken, the Lower Court was held to have been wrong in decreeing the suit on the ground that it could not go into evidence on a question of set-off in a rent suit, and was bound to take an account.

Kemp, J.—THE defendant Roy Nundeeput Mohatoon Bahadoor is the appellant in this case. He was sued by Mr. William Stewart, the manager of the estate of Baboo Jumoona Pershad and others under the Court of Wards, for rent for the year 1277 upon a kubooleut, dated the 24th of November 1861, and a deed of burnonaamah, dated the 19th February 1862. The defendant Roy Nundeeput does not dispute the kubooleut or burnonaamah, but says that under an arrangement between him and Nidhoo Sooklain, the ancestor of the minors, the wards, which was continued also during the lifetime of their father, it was understood as between the lessor and the lessee that a large portion of the jumma payable by Nundeeput Mahatoon, namely, Rs. 15,530, was to be credited against the debt of the lessor to the lessee, the banker defendant appellant, and that the balance of the jumma or Rs. 4,969-4 annas was the huq hajaree of the plaintiff, but that all along from the time of Nidhoo Sooklain, and after her death, from the time of Gooroo Pershad Sookkool, the father of the minor, the ward's business had been carried on between the lessor and the lessee on this footing that the lessee supplied articles to the lessor, and thus paid the rent due either in cash or in kind, or as per "farmaish" or orders of the lessor; and that if an account were taken between the parties, it would be found that so far from the defendant owing any thing to the plaintiff, there was a balance due to the defendant by plaintiff.

Now the suit was instituted on the 3rd of June. The defendant was called upon to enter appearance on the 3rd of July. He did enter appearance on the 5th of July, and the Subordinate Judge decided this suit on the 7th of July. The defendant said that there had been a partition in his family, and that the books referring to the matters in question in this suit were in the hands of other members of the family, and he asked the Court for time to produce them. He also applied to the Court to summon Mr. Stewart with directions to produce the books and papers which he had received on taking charge of the ward's estate, which would show that the rent up to 1276 had been paid in cash or in kind by executing orders of the lessor in the way stated by the defendant. The Subordinate Judge has held that this is a pure question of set-off and that he cannot go into all this evidence in a rent suit. He has therefore given the plaintiff a decree.

We think the Subordinate Judge was decidedly wrong in not deciding the question which arose between the parties, namely, whether the rent had not been paid all along in the manner stated by the defendant. If so, he ought to have taken an account and come to a decision as to whether any thing is due to the plaintiff or not. We reverse his decision and remand the case to him for a retrial with reference to the above remarks. Costs to follow the result.

Digitized by Google

The 3rd December 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Arbitration—Procedure.

Case No. 264 of 1873.

Regular Appeal from a decision passed by the Deputy Commissioner of Maunbhoom, dated the 30th June 1873.

Muddun Mohun Singh (Plaintiff) *Appellant,*

versus

Kanaye Dass Chuckerbutty and others (Defendants) *Respondents.*

Baboo Bhowanee Churn Dutt for Appellant.

Baboo Nil Madhub Sen for Respondents.

Where an arbitration failed and the record came back into the Deputy Commissioner's Court, that officer was held to have had no power to dismiss the suit with costs, without giving notice to the parties or fixing a date for hearing of the suit.

Markby, J.—In this case it appears to us that the judgment of the Lower Court cannot possibly be supported. According to the facts as they appear before us, the arbitration having failed, the record came back into the Deputy Commissioner's Court on the 30th June 1873, and immediately and without giving any notice or fixing any date for the hearing of the suit, the Deputy Commissioner had no power whatever to do this. He was bound to fix a day on which the case should be properly called on and disposed of after hearing the parties if they should appear.

The judgment of the Deputy Commissioner will therefore be set aside, and the case remanded to him for rehearing. Costs will abide the ultimate result.

The 7th December 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Possession.

Case No. 648 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Chittagong, dated the 31st December 1873, *reversing a decision of the Moonsiff of Rungunniah, dated the 28th April* 1873.

Tarinee Churn Musaddee and others (Defendants) *Appellants,*

versus

Jabar Ali (Plaintiff) *Respondent.*

Baboo Aukhil Chunder Sen for Appellants.

Baboo Gopeenath Mookerjee for Respondent.

In a suit to set aside a decree where plaintiff seeks to recover possession on the strength of his title, the Court is bound to try the question of title.

Markby, J.—It seems to us that the opinion expressed by the former District Judge in his order of remand of the 16th July 1873, that no issue of title ought to be allowed to be adjudicated upon between the parties in this case, is not correct. The plaintiff comes to Court to recover possession on the strength of his title. It is quite true that he asked the Court to set aside a decree, but he also asked that his title should be gone into. The first Court had gone into that title and found that it was not established. It is quite clear to us (and indeed in the latter part of the remand order the District Judge seems to have thought so) that the Court had not only clearly a right to try the question of title, but that it was bound to do so. The case must, therefore, be remanded to the District Judge in order that the question of title may be adjudicated upon. Whether under the circumstances of this case, it now having been ascertained that the defendant had ousted the plaintiff from possession by this fraudulent contrivance, it would not be right to call upon the defendant to prove his title, is quite a different matter. All that we say is that the title of the plaintiff must be adjudicated upon.

The costs will abide the result.

Digitized by Google

The 7th December 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Conjugal Rights—Child-Wife.

Case No. 557 of 1874.

Special Appeal from a decision passed by the Assistant Commissioner and Subordinate Judge of Burpetta, dated the 22nd December 1873, *reversing a decision of the Moonsiff and Extra Assistant Commissioner of that district, dated the 15th September* 1873.

Suntosh Ram Doss (Plaintiff) *Appellant,*

versus

Gera Pattuck and another (Defendants) *Respondents.*

Baboo Obhoy Churn Bose for Appellant.

Baboo Mohinee Mohun Roy for Respondents.

Where it was the universal custom of the community to which the plaintiff belonged that a child-wife should remain away from her husband until a certain event had occurred, a Court was held to have been justified, while such contingency had not happened, in refusing to order such a wife to go to her husband, although the marriage was valid.

Phear, J.—We think that this appeal must be dismissed. We understand the Assistant Commissioner by his judgment to find as a fact that in the community to which the plaintiff belongs, it is the universal custom for a child-wife to remain away from her husband, and not to come to live with him in his house until a certain event has occurred. In the present instance, the plaintiff has failed to satisfy the Court that the contingency has happened on the occurrence of which, according to this usage, the plaintiff can ask that the child-wife ought to join her husband. In this view of the facts, the Lower Appellate Court has refused to make the order commanding the wife to go to her husband, notwithstanding that in the opinion of the Court the evidence in the case established the fact that a valid marriage had taken place and that the defendant was the true and lawful wife of the plaintiff.

We are of opinion that under the circumstances thus found by the Assistant Commissioner to be the facts of the case, the Court was justified in refusing to make a decree for restitution of conjugal rights.

The appeal is dismissed with costs.

The 7th December 1874.

Present:

The Hon'ble J. B. Phear, *Judge.*

Cause of Action—Making Evidence—Declaratory Decree.

Case No. 387 of 1874.

Special Appeal from a decision passed by the 2nd Subordinate Judge of Backergunge, dated the 29th November 1873, *affirming a decision of the Moonsiff of Madareepore, dated the 21st December* 1872.

Obhoya Churn Simlye and others (some of the Defendants) *Appellants,*

versus

Mohesh Chunder Doss and another (Plaintiffs) *Respondents.*

Baboos Kalee Mohun Doss and *Doorga Mohun Doss* for Appellants.

Baboos Rash Beharee Ghose and *Bungshee Dhur Sen* for Respondents.

Where, on the occasion of the butwarrah of a zemindaree, the proprietors of an outside talook interfered and caused the Collector to exclude certain land of an ousut talook from the maps and records then made, without opposition from the shikmee talookdars, it was held that their conduct amounted to making evidence which might eventually be used adversely to the rights of the ousut talookdars who, therefore, had a cause of action against them justifying a suit for a declaratory title.

The case of the plaintiffs is that a certain piece of land, described in the plaint, about 9 gundahs odd in quantity, is part of their ousut talook Rughoonath Doss. It bears a jumma of 4 annas, and was created in 1255

Digitized by Google

out of a certain shikmee talook Ram Bullub Acharjea. And this shikmee talook itself is within and subordinate to the zemindaree Pergunnah Beer Mohun. The plaintiffs state that on the occasion of a butwarrah of the zemindaree Beer Mohun being effected between the owners thereof, who are not parties to this suit, the defendants Nos. 1 to 20, proprietors of an outside talook, interfered and caused the Collector in 1871 to exclude the land, which is the subject of suit, from the butwarrah on the ground that it was part of their, the defendants', talook, and not part of the zemindaree which was under partition. The plaintiffs say that their own superior shikmee talookdars, that is, defendants Nos. 21, 22, and 23, made no opposition to this, and therefore they themselves are obliged to bring this suit to have their title declared.

The principal defendants 1 to 20 alone opposed the suit, and they object in the first place that there is no cause of action disclosed in the plaint. They further plead limitation. And finally they deny that there is such an ousut and shikmee talook as alleged by the plaintiff, and say that the disputed land is in their own possession and part of their talook which was originally a portion, but is now separate from the estate Beer Mohun.

The first objection to the effect that no cause of action was disclosed in the plaint, has caused me some doubt; but upon the best consideration that I can give to the case, I am inclined now to think that there is ground set out in the plaint to justify the present suit. The conduct which is charged against the principal defendants amounts to making evidence which may eventually be used adversely to the plaintiff's rights—or, which comes pretty much to the same thing, preventing the construction of evidence which might support those rights. They caused the plaintiff's piece of land to be excluded from the maps and records of the zemindaree Beer Mohun and its dependencies which were made on the occasion of the butwarrah. They have in a sense falsified without removing its landmarks and have done much to obscure, and to render difficult of proof, the plaintiff's territorial relations to his superior tenure-holders. The plaintiff might reasonably be afraid that if he remained silent and acquiesced in the present state of things brought about by the defendants, his conduct might be used as evidence against him hereafter. And upon looking at the case which he has disclosed in the plaint, it does appear to me that he has come into Court to complain of the possible injury which has been done him as soon as he well could. Although the butwarrah was commenced in 1863, it was not until 1871 that the final order of the Collector excluding this portion of the land from the partition was made, and the suit itself was instituted on the 30th January 1872. But the Lower Courts have given the plaintiff a decree declaratory of the right which he claims.

It was argued on special appeal that there is not sufficient legal evidence on the record to justify the Courts in coming to the conclusion that the plaintiff's title is established. And unquestionably the evidence which the plaintiff relies upon for this purpose is exceedingly meagre. He does not directly prove the creation either of the shikmee talook or of his own ousut talook as alleged; but he refers to several documents which afford some evidence against the defendants on this point. He puts in a kobalah which purports to transfer the shikmee talook from a certain vendor to a purchaser. It was admitted that this document was prepared by one of the principal defendants, and that three of the other defendants claim rights in the property under it. And this kobalah recites in it the ousut talook of the plaintiff; besides, of course, in terms speaking of the existence of the shikmee talook which it purports to deal with. I am unable to say that this document is not some evidence available for the benefit of the plaintiff against the defendants in this suit. And there is also a chittah which was put in by the defendants themselves in support of their own case in which the boundaries of a certain plot are mentioned in these words:—"To the west of the jote of Gour Soondur, in talook Ram Bullub Acharjea." And this seems to be, so far as it goes, at least a statement made by the defendants that there was such a talook Ram Bullub Acharjea in existence at this very time. As I have already remarked, the evidence is no doubt exceedingly meagre; but both the Courts below have been entirely convinced by that evidence that the plaintiff's case is true, and have also upon the footing of the evidence put in by the defendants themselves, formed a very adverse opinion as to honesty of the defendants' conduct.

On the whole, I think, sitting here as I do on special appeal, I should not be justified in disturbing the concurrent finding of fact at which the two Lower Courts have thus arrived. I therefore dismiss the appeal with costs.

Digitized by Google

The 9th December 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Presumption — Limitation — Act XIV of 1859 *s.* 1.

Appeal under Section 15 *of the Letters Patent against the decision of the Hon'ble F. B. Kemp, one of the Judges of this Court, dated the* 24*th August* 1874, *in Special Appeal No.* 2289 *of* 1873, *from the decision of the Judge of Patna dated the* 27*th June* 1873, *affirming a decision of the Additional Sudder Moonsiff of that district, dated the* 7*th January* 1873.

Mussamut Bunnoo and others (Defendants) *Appellants,*

versus

Moulvie Ameerooddeen (Plaintiff) *Respondent.*

Mr. M. L. Sandel for Appellants.

No one for Respondent.

A person whose right to resume and assess certain lands is acquired by purchase from the Government, must date such right, not from the time when he became the purchaser, but from the time when the right first accrued to the Government.

The following is the judgment which was appealed against :—

THE plaintiff is the special appellant in this suit. He sues to assess 5 cottahs and 4 dhoors of land in the occupation of the defendant as belonging to the plaintiff's mal mouzah which he has purchased from Government. The defendant pleaded limitation, and stated that the 5 cottahs and 4 dhoors in suit were kuburistân and imambara lands and were not assessable. Both Courts have thrown out the plaintiff's case as barred by the statute of limitation, and therefore the sole point for consideration in this appeal is whether the suit is barred or not. The suit was instituted on the 4th July 1872. It is, therefore, governed in so far as the period of limitation is concerned by Act XIV of 1859, and under Clause 14 Section 1 of that Act in suits for the resumption and assessment of any lakheraj or rent-free lands, the period of 12 years' limitation is prescribed, and the time when that period of 12 years begins to run is laid down to be when the right to resume or assess the lands first accrued. Now it is clear that the right of the plaintiff to assess these lands accrued to him within 12 years prior to suit. In short, the permanent settlement of the mouzah in which this land is admittedly situated, be is rent-free or mâl land, was not made until March 1861, and the plaintiff's right by purchase from Government was acquired in March 1871. Clearly, therefore, the period of 12 years, which is the period of limitation for suits for the assessment of rent-paying lands, had not run out when the suit was brought. Being of opinion that the suit is not barred, the suit is therefore remanded to the first Court for trial on the merits. Costs to follow the result.

The following is the judgment of the Appellate Bench :—

Couch, C.J.—The words of Clause 14 Section 1 of Act XIV of 1859 are very clear. In a suit of this description, the period of 12 years is to date from the time when the title of the person claiming the right to resume and assess the lands, or of some person under whom he claims, first accrued. The plaintiff claims under the Government, and the question is whether the right to resume and assess did not first accrue to the Government more than 12 years before the suit was brought. The plaintiff has no right to date the period from the time when he became the purchaser. And it is clear that the Government, if it had a right to resume and assess these lands, acquired it much more than 12 years before the suit was brought.

It appears to us that the decree of the District Judge, who is now one of the learned Judges of this Court, was right. The decree of the Division Bench of this Court must be reversed, and the decree of the Lower Court be affirmed with costs to the present appellant in this Court.

Digitized by Google

The 10th December 1874.

Present :

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Certificate of Administration—Act XXVII of 1860.

Case No. 326 of 1874.

Miscellaneous Appeal from an order passed by the Officiating Judge of Patna, dated the 16th May 1874.

Eâd Ali Khan and another (Petitioners) *Appellants,*

versus

Wahed Ali Khan (Opposite Party) *Respondent.*

Mr. C. Gregory and *Moonshee Abdool Baree* for Appellants.

Mr. M. L. Sandel and *Moonshee Mahomed Yusoof* for Respondent.

Where the applicant for a certificate under Act XXVII of 1860 was the husband as well as the cousin of the deceased, it was held that the certificate ought to have been granted to him alone, and not jointly with another cousin who opposed the application.

Kemp, J.—This is an application on the part of Eâd Ali and Jumal Ali *alias* Jumun Khan for a certificate under the provisions of Act XXVII of 1860 to administer to the estate of Mussammat Wuzeerunnissa, deceased. It is admitted that Eâd Ali is the husband of Wuzeerunnissa as also her cousin. The party who opposed this application is Wahed Ali, the uterine brother of Eâd Ali, and consequently also the cousin of Wuzeerunnissa.

The main point in conflict between the parties was whether Jumal Ali was the legitimate son or not of Chuttroo Khan, Chuttroo Khan being the son of Eâd Ali, and therefore if Jumal Ali is the son of Chuttroo Khan, he is also the grandson of Eâd Ali and Wuzeerunnissa.

We are not prepared at this stage of the case to hold that the Judge was wrong in saying that the evidence was not sufficient to prove that Jumal Ali was the grandson of Eâd Ali, but we think that when it is admitted that Eâd Ali is the husband as well as the cousin of the deceased, he ought to have obtained the certificate alone, and not jointly with Wahed Ali. We, therefore, reverse the decision of the Judge and direct that a certificate be granted to Eâd Ali alone ; the Judge taking security from him if he thinks proper to do so.

The appeal is decreed with costs. Pleader's fees 2 gold mohurs.

The 11th December 1874.

Present :

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Mortgagor's Legal Representative—Notice of Foreclosure.

Case No. 287 of 1873.

Regular Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 19th August 1873.

Sheo Golam Singh and others (some of the Defendants) *Appellants,*

versus

Ram Roop Singh (Plaintiff) and others (Defendants) *Respondents.*

Mr. C. Gregory and *Baboo Mohesh Chunder Chowdhry* for Appellants.

Baboos Chunder Madhub Ghose and *Hem Chunder Banerjee* for Respondents.

The legal representative of a mortgagor is entitled to redeem the mortgaged property, and, as such, is entitled to notice of foreclosure.

The mortgagor's legal representative is the person who either by law or by contract between the parties succeeds the mortgagor in the position which he holds relative to the mortgagee, in respect of the property : and a succession of this kind may occur either by the death of the mortgagor or by assignment of the equity of redemption.

Kemp, J.—The plaintiff sued for possession of a 3-anna share in a 2-anna of mouzah Royputty, of a 3 annas 2 pie share in the entire 3-anna mouzah named Meerpore Bhawal, of a 7 annas 2 pie share in 2-anna mouzahs named Mothoorapore Mahabul, of a 4 annas 2 pie share in one entire 9-anna mouzah named Mujhwa, appertaining to mehal Royputty, Pergunnah Kasmur, basing his right on the ground that he had foreclosed a deed of mortgage, dated the 14th of December 1870. He also sued to set aside an application and vakalutnamah, dated the 8th of February 1873, which he alleges were fraudulently filed by the defendant to gain time without the plaintiff's knowledge. He estimates his suit at ten times the public revenue, and alleges that his cause of action arose on the

Digitized by Google

25th of November 1872, the date on which he foreclosed, and on the 15th of March 1873, the date on which he discovered the defendant's fraud in the matter of the petition and vakalutnamah mentioned above.

The plaint recites further that for a consideration of Rs. 9,600, the property was mortgaged to the plaintiff, and on a sum of Rs. 12,010-8 becoming due to the plaintiff, the plaintiff applied under the provisions of Regulation XVII of 1806 to foreclose; that previous to the date of the foreclosure the plaintiff upon the defendant's entreaties twice granted him short periods of grace to pay the money, that the last period so granted expired on the 14th of November 1872, and that on the 25th of November of the same year the foreclosure was completed; that although the defendant subsequently applied for further grace, the plaintiff refused to grant any further extension of time. Then the plaintiff sets forth the fraud alluded to above.

The mortgagors defendants did not appear in this appeal; they appear to be satisfied with the decision of the Court below. The appellant before us is a party who claims to be the legal representative of the mortgagors quoad a certain portion of the properties hypothecated by the mortgagors. The first question, therefore, which we have to consider is whether a party in that position is entitled to redeem or not. That question has been set at rest by a decision to be found in Volume III Bengal Law Reports, page 172, passed by Justices L. S. Jackson and Markby.*

The Subordinate Judge disposes of the question whether the defendants appellants before us were entitled to notice, in four lines. He says that the notice of foreclosure on the three mortgagors defendants Nos. 1, 2, and 3, who are not before us, is by all means sufficient in law, and that the defendants appellants before us are not entitled to any notice. Then he refuses to go into the question of fraud inasmuch as he holds that question to be entirely superfluous, because whether the fraud be proved or not proved, the fact of the non-deposit of the entire amount due under the mortgage deed renders the sale absolute and conclusive. We, therefore, have first to consider whether the appellants before us were entitled to a notice or not, for if they were so entitled the suit of the plaintiff as against them must be dismissed, and it will not be necessary for this Court to go into the question whether the mortgagee, the plaintiff, did or did not give the mortgagors further time to pay the mortgage debt, or whether the petition impugned by the plaintiff, and the vakalutnamah on which the petition is based, are fraudulent transactions or not.

Now, with reference to the question of notice, we have to look to the terms of Section 8 Regulation XVII of 1806. That Section enacts that whenever a mortgagee is desirous of foreclosing his mortgage, and rendering the sale conclusive on the expiration of the stipulated period, &c., he shall (after demanding payment from the borrower or his representative) apply for that purpose, namely, for the purpose of foreclosing, by a written petition to the Judge of the zillah or city in which the mortgaged land or other property may be situated. And the Judge's duty on receiving such written application, is to cause the mortgagor or his legal representative to be furnished, as soon as possible, with a copy of it, and at the same time notify to him, by a perwannah under his seal and official signature, that if he shall not redeem the property mortgaged in the manner provided for by Section 7 within one year from the date of the notification, the mortgage will be finally foreclosed, and the conditional sale will become conclusive. Now in this case it is necessary to refer to dates. The application by the mortgagee under the Regulation was made on the 2nd of October 1871. The ittlanamah or notification appears to have found its way to the nazir's office on the 10th of October 1871, but it was not issued by the nazir until the 12th, and the notice was not served on the mortgagors until the 20th of October 1871. Under the Full Bench Ruling to be found in Volume X Weekly Reporter, it has been held by this Court that the year of grace runs, not from the date of the notice, but from the date on which the notice is served. Therefore the year of grace in this case commenced on the 20th of October 1871. The defendants appellants before us purchased a portion of the mortgaged properties on the 9th of October 1871; the deed of conveyance was presented for registration on the 11th of October of the same year, and was registered on the 12th, that is to say, the transaction was completed on the very day on which the notification under Section 8 Regulation XVII of 1806 was made over to the peon for service. The terms of the mortgage deed provide for the redemption by the mortgagor or his legal representative of any portion or portions of

* 11 W. R., 548.

Digitized by Google

the mortgaged properties. In the deed it is recited what mouzahs are mortgaged, with the sums which are advanced on each particular mouzah, and there is a stipulation that if the mortgagor wishes to redeem any mouzah or mouzahs mortgaged by the repayment of the sum advanced on each particular mouzah, he shall be entitled to redeem such particular mouzah.

Now in this case, we have to decide who is the legal representative of the mortgagor with reference to the mouzahs involved in the present appeal. The leading case on *this* point is a case to be found in *Volume* III Weekly Reporter, decided by *Justices* Bayley and Phear. The governing judgment in that case was delivered by *Mr.* Justice Phear, and that ruling has since been followed in several other cases by various Benches of this Court. The learned Judge observes, in treating of what is the meaning of the term mortgagor's legal representative, that the words naturally designate that person who, either by law or by contract, between the parties succeeds the mortgagor, whether mediately or immediately, in the position which he holds relative to the mortgagee in respect of the property which is the subject of the mortgage; that a succession of this kind may occur either by reason of the death of the mortgagor or by assignment of the equity of redemption, if the assignment is not inconsistent with the terms of the original mortgage; that when the mortgagee desires to foreclose, there can be no practical difficulty in ascertaining whether the equity of redemption as against the mortgagee is in the hands of the original mortgagor himself, or in those of one of the substitutes for him which the learned Judge describes; and that in whichever of these it is found to be, to that one in the learned judge's judgment, the notice must be issued in order to initiate the year of grace, whether such assignment was effected by public or by private sale; but that when once the year of grace is set running, no subsequent assignment of the equity of redemption can stop it. Now in this case it is very clear that the appellants before us are, with reference to the remarks quoted above, the legal representatives of the mortgagor, and there is also every reason to believe that the mortgagee was cognizant of the purchase by the appellants, for we find that he was a witness to the deed of conveyance, and it is clear that no notification such as is contemplated by Section 8 of the Regulation quoted above, was issued and served upon the mortgagor or his legal representatives, the appellants before us, before the appellants acquired the right to the equity of redemption under the deed of conveyance in October 1871.

Holding, therefore, that the appellants who are the legal representatives of the original mortgagor with reference to a portion of this property, were entitled to a notice, we reverse the decision of the Subordinate Judge, Mr. S. DaCosta, and dismiss the plaintiff's suit in so far as the appellants before us are concerned, with costs of both Courts.

The 11th December 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Survey Award—Admissions—Cause of Action.

Case No. 537 of 1874.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 17*th December* 1873, *reversing a decision of the Additional Subordinate Judge of that district, dated the* 19*th February* 1873.

Kashee Kishore Roy Chowdhry (Plaintiff) *Appellant,*

versus

Bama Soondaree Debia Chowdhrain and others (Defendants) *Respondents.*

The Advocate General and *Baboo Rash Beharee Ghose* for Appellant.

Baboos Hem Chunder Banerjee, Kalee Mohun Dass, and *Nil Madhub Sen* for Respondents.

In a suit to recover possession of certain land, plaintiff alleged that he had been in possession on the occasion of a survey award made between himself and defendant B's predecessors; that he afterwards brought an unsuccessful suit for rent against B and others, in which B admitted his title and possession, and thats ubsequently he brought a suit for a kubooleut against the ryots, in which B intervened, but the issue was found against B:

HELD that the survey award was evidence *quantum valeat* between the parties of the fact of possession, that defendants' alleged admission was an important part of plaintiff's case, and that plaintiff's cause of action was B's intervention in the rent suit.

Phear, J.—IN this suit the plaintiff seeks to recover possession of certain land from

Digitized by Google

one Bama Soondaree Debia and others, defendants. His case is that he was in possession of this land on the occasion of a certain survey award being made in 1855 between him and Bama Soondaree's predecessors; that afterwards he brought a suit against Bama Soondaree and others to recover rent for this same land, and though in that suit he was defeated by reason of his failing to prove that the rent which he sued for was due, yet Bama Soondaree there admitted his title to and possession of the land; that again he brought a suit against a ryot or ryots in possession of this land seeking to obtain from the defendant a kubooleut under the provisions of the rent law. In this suit Bama Soondaree intervened, asserting that she was in possession of the land, that the defendant was not so, and that consequently the plaintiff had no right to obtain a kubooleut from the ryot. Upon this allegation of possession on the part of Bama Soondaree, issue was joined, which was found against Bama Soondaree.

So that if the plaintiff's case is a true one, and he is able by evidence to establish these facts, then from the period at which he started his case, namely, in 1855, down to the date of this last decree in the suit for the kubooleut, it would appear that he was both entitled to the land which is now in dispute, and also in possession of it by the hands of persons who though they might not have during all the time paid him rent (or indeed during any part of the time paid him rent) yet still throughout that period acknowledged his right; and consequently their possession of the land was, as the first Court found, a permissive possession. But by the assertion of title on the part of Bama Soondaree in the way of intervening in the suit for the kubooleut, her possession, whatever was its previous character, became adverse and hostile to the plaintiff. He then by reason of her conduct acquired a cause of suit against her to turn her out of possession, and that is the cause of action upon which he has brought this suit. To repeat, if the facts which the plaintiff alleges in his plaint relative to the land for which he sues be true, and be substantiated by evidence, then his cause of action accrued at the time when Bama Soondaree disclaimed his right in the rent suit—that is at a time which is admittedly within the period of 12 years immediately preceding the institution of this suit—and this suit is, therefore, not barred by limitation. In other words, this is one of the very few suits (they are much fewer than is commonly supposed) in which, if the question of limitation is raised, the decision of that question is inseparable from the decision of the merits of the plaintiff's claim.

The Judge on regular appeal has dismissed the plaintiff's suit upon the plea of limitation, and has, as we understand his judgment, declined on that ground seriously to entertain the question raised by the defendant as to the truth of the substantial allegations in the plaint. Indeed, he has said that the plaintiff cannot be allowed to adduce as evidence in support of his claim either the survey award of 1855 or the admissions made by the defendant's agent in the rent suit, or the finding of the Court on the issue which was raised by the intervenor in the suit for kubooleut. Whereas, the facts of which these documents and records are the best evidence, are really the essential facts of the plaintiff's case. To reject them as inadmissible is in effect to say that the plaint does not present any right of action. The survey award of 1855, if it was made relative to the land which is the subject of this suit, is unquestionably evidence *quantum valeat* as between the parties of the fact of possession on the part of the plaintiff at the date of the award as alleged by the plaintiff. The alleged admissions or statements of fact made by the defendant or by her representatives on her behalf in the suit referred to certainly form a most important part of the case upon which the plaintiff relies, and he ought to be allowed to prove them and to show that they concern the land which is the subject of the present suit or a substantial part of it. Lastly, the fact that the intervention of Bama Soondaree in the suit for a kubooleut failed upon the issue raised between her and the plaintiff on her own allegation of possession is, in truth, as the plaintiff's case is shaped, the cause of action upon which he comes into Court. We are of opinion that the Judge ought to have looked at all these pieces of evidence bearing upon this point, and given them his best consideration even for the purpose of determining the question of limitation. But, as has already been remarked, the determination of the question of limitation is inseparable from the determination of the merits of the plaintiff's suit.

In this view, we think that the decision of the Lower Appellate Court must be reversed, and the case remanded to that Court for retrial.

The costs of this appeal will abide the event.

Digitized by Google

The 11th December 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Evidence—Act VIII of 1859 *s.* 128.

Case No. 693 of 1874.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 23*rd December* 1873, *affirming a decision of the Additional Subordinate Judge of that district, dated the* 15*th April* 1873.

Syed Ikram Hossein (Defendant) *Appellant,*

versus

Ram Lochun Dutt and others (Plaintiffs) *Respondents.*

Mr. A. F. Lingham, Baboo Ashootosh Dhur, and *Moonshee Serajul Islam* for Appellant.

Baboos Sreenath Dass and *Hem Chunder Banerjee* for Respondents.

Where a plaintiff was allowed to file as decisive evidence in his favor a decree which the Judge knew had been reversed in appeal, and the defendant was prevented from having the benefit of evidence which he had it in his power to offer as to that appeal decree, because of a rigid construction put upon Act VIII of 1859 s. 128, it was held that the Judge had in effect allowed plaintiff to fabricate evidence:

HELD that the main object of s. 128 was to prevent parties from manufacturing evidence pending the trial, to meet unexpected exigencies, not to shut out true good and valuable evidence, merely because the party had, without good and assignable cause, abstained from bringing it before the Court at the first hearing.

Phear, J.—THE plaintiffs purchased the property which is the subject of suit at a sale held in execution of a decree against Sadutoollah and Mahomed Ismail, being the defendants Nos. 1 and 2. And they seek now to recover possession of this property from those defendants, and another defendant Ikram Hossein upon the foundation of the title passed to them by that purchase.

The principal defendant, no doubt, is Ikram Hossein. And the question whether the plaintiff is entitled to recover the property for which he sues as against Ikram Hossein, has turned in the trial which has been had in the Courts below upon the question whether the decree in a certain suit which Sadutoollah brought against Ikram Hossein for possession of this property, was passed in favor of Sadutoollah or of Ikram Hossein.

The Lower Appellate Court has found on the merits of the case with reference to the evidence on the record "that a Court of "competent jurisdiction adjudged the talooks "which form the subject-matter of dispute "in this case to be the property, and in the "possession, of defendant No. 1, Sadutoollah, "thus confirming the validity of the hibana-"mah under which Ikram Hossein conveyed "them to him."

In an earlier part of its judgment, the Lower Appellate Court has made the following other remarks with reference to the decree which is here referred to. The Judge says:—"In Sadutoollah's suit the Court of first "instance upheld the validity and genuineness "of the hiba (that is, the hiba under which "Ikram Hossein had conveyed the property "to Sadutoollah), and decided that the pro-"perty could not be sold in execution of the "decree against Ikram Hossein.

"The case at this point takes a very extra-"ordinary turn. It is admitted that from "the order of the Court of first instance, an "appeal was preferred (that is, in the suit of "Sadutoollah), and on the hearing of the "present appeal it seemed to be well under-"stood by both parties that the result of that "appeal might have a very important bear-"ing on the case,—a bearing more favorable "to the case of the appellant than otherwise; "it may be said much more favorable."

The Judge there appears to be somewhat studious to veil his meaning. But it is beyond dispute that he makes these remarks in view of the admitted fact that the decree of the Court of first instance in Sadutoollah's suit, upon which the plaintiff relies in the present suit, was reversed on appeal. And this being so, it is very significant that the Judge says "it seemed to be well understood by both the "parties before him" that the result of the appeal before him would be very different from what it proved to be if the decree passed on appeal in Sadutoollah's case was put in evidence in the present suit; that is, if the plaintiff's case in the present suit was not left to rest upon the decree of the Court of first instance in Sadutoollah's case: yet with this knowledge of the facts and of the relations between the parties to this suit, the Judge thought it right, in pursuance of the very stringent construction which he placed upon Section 128 of the Civil Procedure Code, to prevent the defendant from putting into Court or from having the benefit in Court of the evidence which he undoubtedly had it in his power to offer as to the effect of the appeal decree. It would seem then that the Judge felt himself obliged, by the force of the 128th Section of the Civil Procedure Code, in a manner to connive at the plaintiff in this suit committing a deliberate fraud. By his account

Digitized by Google

the plaintiff knew that the decree which he pretended to put into Court as being the decree between the parties in Sadutoollah's suit, decisive of their relative rights, was not an effective decree of Court at all, because he knew that that decree had been reversed. And the Judge also betrays his knowledge that the decree of the Court of first instance in Sadutoollah's case was not the final decree, decisive of the rights of the parties in that case, yet he allows it to be used, and in the end gives a decree for the plaintiff based solely upon the decree of the Court of first instance in Sadutoollah's case. He declines to enter into any of the merits of the present case between the parties before him which might lie outside the decision of the Court of first instance in Sadutoollah's case. It seems to us clear that the Judge has been most unhappily misled in this matter. It was quite apart from any question as to the true meaning of the 128th Section of the Civil Procedure Code, it was clearly his duty to take care that evidence should not be used between the parties in the suit before him which he had reason, and good reason, to suppose was not real evidence, without testing it to the best of his ability. By allowing the decree of the Court of first instance in Sadutoollah's case to be treated in this suit as a final decree between the parties in that case, he allowed the plaintiff in effect to fabricate evidence: he permitted the plaintiff knowingly to put into Court as the binding decree between certain parties that which was not the binding decree between the parties, and which moreover the Judge himself apparently knew was not so. It is most unfortunate that a course of his kind should have been pursued in supposed obedience to the necessity of the Civil Procedure Code, because plainly whatever course the Civil Procedure Code rendered incumbent upon the Judge with regard to the admission of the document tendered by the defendant, it in no way relieved him from the duty of taking care, so far as he could, that false evidence was not employed in the suit by the plaintiff. We are of opinion that, under these circumstances, the decree of the Lower Appellate Court cannot be upheld. The foundation upon which it stands altogether fails the plaintiff. The supposed decree by which the Judge says "a Court of competent jurisdiction adjudged the talooks which form the subject-matter of dispute in this case to be the property and in the possession of defendant No 1 Sadutoollah," and upon the footing of which he declined to enter into any other material questions between the parties, was in effect nothing more than a piece of waste paper. The Court should unquestionably in this case have asked the plaintiff, when he tendered this decree in evidence, whether that was the final decree between the parties. Had he said it was, the probability is that further proceedings of a totally different character might have been taken against him. And even if the Court did not adopt this course, it ought at least to have taken care that the whole of the record of the former suit was sent for and put into evidence, and it ought not to have remained under the circumstances of this case content with the copy of one of the documents alone taken from it.

Regard being had to the turn which this case has taken, it is not incumbent upon us to give a judicial decision as to the true scope of Section 128 of the Civil Procedure Code. But we shall hardly be going too far if we say that the main object of that Section was to prevent parties from manufacturing evidence, pending the trial, to meet unexpected exigencies, when they have found in the course of the trial some necessity or expediency of being fortified with documents which they had not at their command at the time when the trial commenced. It never was intended that true, good, and valuable evidence, as to the quality of which the Court could have no possibility of doubt, should be inexorably shut out, merely because the party had, without good and assignable cause, abstained from bringing it before the Court at the first hearing. Probably the true meaning of this Section would limit its application to documents in the possession or under the immediate control of the party. It could scarcely have been intended to apply to such a case as the present, where the evidence which the defendant desired and was ready to bring into Court was the record of a trial which was filed in another Court, and which could be verified beyond impeachment by the Judge, if he thought fit to do so. And we may add, that Section 138 empowers the Judge, irrespective of the conduct of the parties, to send for the record of any case which he thinks necessary for the purpose of doing justice between the parties in the suit before him. It can hardly be doubted on the Judge's own showing that it was eminently necessary for the purpose of doing complete justice between the parties, that the true record of the case to which both the plaintiff and the defendant appealed for their rights, should

Digitized by Google

have been produced to the Court. The Judge, therefore, seems in our opinion to have misapprehended the obligation with regard to reception of evidence which Act VIII of 1859 placed upon him when he refused to give the defendant even at the late stage of the trial, the opportunity of bringing the record of Sadutoollah's suit into Court.

It has been pressed upon us by the learned pleader who has appeared on behalf of the respondent that even if the plaintiff's case cannot be supported upon the finding of fact at which the Lower Appellate Court has arrived, yet there remained other facts which were found by the first Court and were not impeached on the appeal preferred to the Lower Appellate Court, which would be sufficient to support the decision in which both the Lower Courts have concurred.

The argument is shortly this, that even if the property in suit be not the property of Sadutoollah, and if as between Sadutoollah and Ikram Hossein it be the property of the latter, yet the plaintiff was misled into purchasing this property as the property of Sadutoollah upon the faith of a state of things with regard to the possession and other indicia of title to this property, of which Ikram Hossein himself had been the author. Therefore, on this state of facts, Ikram Hossein could not be allowed to set up the true title as against the apparent title in Sadutoollah upon the faith of which the plaintiff had bought and which he himself had caused. And if these facts had been really, as it was assumed in the argument they were, established with distinctness in the first Court and not disputed in the Lower Appellate Court, we should have felt ourselves obliged to give effect to this argument. But although the Moonsiff has dealt with this particular question, and, so far as we can perceive from his judgment, has dealt with it upon proper principles, yet we are not sure that the facts which he assumed for the purposes of his judgment were distinctly stated by him, and were not in fact disputed on appeal. The Moonsiff says: —"The main gist of the "defendant's contention is that the alleged "hiba was fictitious, but he cannot reap "any benefit from such allegation, since "under the common principles of equity a "person should not be allowed to take "advantage of his own fraud, and there is no "proof on the defendant's part that at the "time of the grant he had reserved any "special interest in the property in his "own hands." In these words, the Moonsiff plainly refers to more facts than are absolutely necessary to be considered for the right decision of the present case. And those facts have not been separately found by him in any other passage of his judgment. We think that we should do wrong in depriving the respondent of the opportunity of having the facts which are relevant to this part of the case considered and determined by the Lower Appellate Court. Therefore while we think that the decree of the Lower Appellate Court cannot be upheld upon the ground on which the Judge has placed it, we think that we must remand the case to the Lower Appellate Court for retrial of the question whether or not the plaintiff was misled into purchasing this property as the property of Sadutoollah by reason of the conduct of Ikram Hossein, the special appellant.

We understand that so far as concerns the 5 annas which belonged to Ismail, there is no appeal before us. With regard to that portion of the property then, the decree of the Lower Appellate Court will not be disturbed. With this exception the decree of the Lower Appellate Court is reversed, and the case remanded for retrial upon the issue which has been mentioned.

We may add that the original record in Sadutoollah's case should be sent for by the Judge and received in evidence in this case.

The costs of this appeal will abide the event.

The 14th December 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Execution—Limitation—Act VIII of 1859 s. 216—Interlocutory Suit.

Case No. 359 of 1874.

Miscellaneous Appeal from an order passed by the Officiating Judge of Rajshahye, dated the 25th June 1874, affirming an order of the Subordinate Judge of that district, dated the 23rd May 1873.

Pearee Soonduree Debia (Judgment-debtor) *Appellant,*

versus

Bhubo Soonduree Debia (Decree-holder) *Respondent.*

Digitized by Google

Baboo Probodh Chunder Mitter for Appellant.

Baboos Chunder Madhub Ghose and *Aukhil Chunder Sen* for Respondent.

A suit brought by a judgment-creditor against his judgment-debtor and a third party, may be of such a nature as to count as previous proceedings in execution for the purpose of saving time in regard to the operation of the statute of limitation; but it cannot in any sense be considered as an "order passed on a previous application for execution" within the meaning of Act VIII of 1859 s. 216.

Phear, J.—THIS is an application which was made by a judgment-creditor on the 19th June 1872 for execution of his decree. And the substantial objection made on special appeal to the granting of that application is that "the Lower Appellate Court has "erred in law in holding that 'no notice was "required to render valid the application for "execution' made on the 19th June 1872, "inasmuch as that application was not "made within one year from the date of the "last order passed on the previous applica-"tion by the decree-holder for execution of "his decree."

The Judge thus states this part of the case:—"So long ago as August 1866, the "plaintiff in this case obtained a decree for "arrears of rent, I believe in the Court of "the Deputy Collector of Serajgunge, which "was confirmed by the High Court in May "of the following year, and since that time "the decree-holder has been in vain enden-"vouring to realize his money. It is "unnecessary to follow him step by step, as "there is only one point for decision in this "suit, *viz.*, whether a certain suit which he "was obliged to bring in the Civil Court "in order to establish that the judgment-"debtor was owner of certain property, and "therefore that that property was liable to "attachment in satisfaction of the rent suit "judgment, was or was not a proceeding in "execution sufficient to keep the decree "alive, and to obviate the necessity of the "issue of further notice to the decree-debtor "before attachment and sale of his property "within one year from disposal of the said "civil suit.

"The necessity of that suit arose from "the fact that a relation of the defendant "came forward and claimed the attached "property as his, and actually got it released "in his favor by an order of the Deputy "Collector on the 22nd September 1869.

"The suit in the Civil Court was filed on "the 8th August 1870, and if it was a step "in execution, no 'notice' was required to "render valid the application for execution "subsequently made, because a year had not "expired from the date of the *termination* "of the previous proceeding in *execution* "to the date on which that subsequent appli-"cation for execution was made. The suit "was finally decreed in appeal on the 4th "September 1871. On the 19th of June "1872, the decree-holder applied once more "for execution."

It appears to us from this portion of the Lower Appellate Court's judgment that the Judge somewhat erred in his apprehension of the nature of the appellant's case. The objection to the issuing of the process of execution made by the judgment-debtor was to the effect that the provisions of Section 216 Act VIII of 1859 had not been complied with. That Section says:—"If an "interval of more than one year shall have "elapsed between the date of the decree and "the application for its execution, ... "the Court shall issue a notice to the party "against whom execution may be applied "for, requiring him to show cause, *within* "a limited period to be fixed by the Court, "why the decree should not be executed "against him. Provided that no such notice "shall be necessary in consequence of an "interval of more than one year having "elapsed between the date of decree and the "application for execution, if the applica-"tion be made within one year from the "date of the last order passed on any pre-"vious application for execution."

The Judge seems to think that this Section would be satisfied if the application for execution was made within one year from the date of the termination of any previous proceedings on the part of the judgment-creditor which were such as to have the effect of keeping the decree alive. But the words of the Section are express, that the application must be made within one year from the date of the last order passed on any previous application for execution. And, therefore,

Digitized by Google

notwithstanding the fact that the suit, of which the Judge speaks, as having been brought by the judgment-creditor against the judgment-debtor and a third party, might have been of such a nature as to count as previous proceedings in execution for the purpose of saving time in regard to the operation of the statute of limitation, still it could not in any sense be considered as an "order passed on a previous application for execution." We are, therefore, of opinion that the reason which the Judge has given for overruling the objection of the judgment-debtor is not a good reason.

We find, however, on looking into the record that that objection was, as a matter of fact, ill-founded, because this application for execution which was made, as has already been mentioned, on the 6th Assar 1279 or 19th June 1872, was preceded or accompanied immediately by the order for the issuing of a notice to the judgment-debtor, and there is on the record the return of service made by the peon who seems to have been charged with the duty of serving that notice.

It has been argued before us that according to the terms of the return or report of the peon itself, we ought to infer that the notice was not properly served. But inasmuch as the Court which had to judge of the sufficiency of the service must have treated it as a good service, because it afterwards proceeded with the execution and ultimately carried the proceedings in execution to the event of sale on the 19th November 1872, we ought not now on special appeal to find as a fact from such slight materials as the wording of the peon's report of service, that that service was not in fact effected. The case might have been different altogether, if the special appellant could have satisfied us that a mistake had been made in this respect. We think, as the case stands, that we ought to treat that notice as a real effective notice; and that being so, the objection which has been made by the special appellant fails, although, as has already been remarked, not, as we think, for the reason which has been given by the Lower Appellate Court.

We dismiss the appeal with costs.

The pleader's fees are assessed at one gold mohur.

The 14th December 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Maintenance.

Case No. 842 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Rajshahye, dated the 14th January 1874, reversing a decision of the Subordinate Judge of that district, dated the 11th January 1873.

Koomaree Debia (Plaintiff) *Appellant,*

versus

Roy Luchmeeput Singh Bahadoor and another (Defendants) *Respondents.*

Baboo Issur Chunder Chuckerbutty for Appellant.

Mr. R. T. Allan and *Baboos Sreenath Doss* and *Rash Beharee Ghose* for Respondents.

A party entitled to maintenance out of an estate may claim to have a charge for such maintenance upon the estate, into whosesoever hands the property may go.

Phear, J.—The plaintiff starts her case with a reference to a decree which was passed between herself and Goluck Chunder, and which shows that she is only entitled at the most to a maintenance of Rs. 50 a month out of this property. She therefore has no claim as against Goluck Chunder and Goluck Chunder's assignees or representatives to any greater extent than the Rs. 50 a month. In this suit she claims khas possession of the whole of the property, and that claim has been dismissed by the Lower Appellate Court. It appears to us that the decision of the Lower Appellate Court is strictly right and ought not to be disturbed. At the same time that decision does not prevent her, if she is so advised and has good reason to do so, from claiming to have a charge upon the estate into whosesoever hands it has come, to the extent of her right to maintenance if she has any such right.

We dismiss the appeal with costs.

Digitized by Google

The 14th December 1874.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Suit to fix Rent—Kuboolent—Act VIII (B.C.) of 1869.

Case No. 1417 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 24th March 1874, *affirming a decision of the Moonsiff of Sulkhia, dated the 18th September* 1873.

Anunto Ram Mookhopadhya (Defendant) *Appellant,*

versus

Thakoor Doss Bundopadhya (Plaintiff) *Respondent.*

Baboo Rash Beharee Ghose for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

In a suit by a landlord to have his tenants' rent fixed, not being strictly a suit under Act VIII (B.C.) for a kubooleut, plaintiff cannot require the defendant to take a lease, or acknowledge that he is a tenant of the land for any fixed period.

Couch, C.J.—THE plaint in this case showed that there had been a suit between these parties numbered 4 of 1868, in which the plaintiff sought to recover from the defendant khas possession of the land which is the subject of this suit. By the judgment in that suit it was found that the land was in the possession of the defendant, but it was decided that the plaintiff was not entitled to khas possession, and that the defendant was responsible to him for the rent of the land at the pergunnah rate paid for adjacent lands of the same quality. The plaintiff, although he could not obtain possession of the land, was entitled to be paid rent for it. This judgment did not, and from the nature of the suit could not, fix the amount of the rent. The present suit is brought to have the rate of the rent fixed. It is not strictly a suit under Act VIII (B.C.) of 1869, for a kubooleut. The plaintiff has asked for one and has spoken of being ready to give a pottah ; but that is not really appropriate, for he cannot require the defendant to take a lease, or acknowledge that he is a tenant of the land for any fixed period. All that the plaintiff wants is that it shall be determined what is the rate of rent, and this has been done by the Lower Courts. It is true that in the decree determining that, there is a statement that the plaintiff is entitled to a kubooleut for that rent, which is to run from the date of suit ; but we do not understand this to mean more than that the plaintiff is entitled to have a written admission from the defendant that he is liable to pay that rent for the land, so long as he continues to occupy it. Treating the words as meaning that, we do not think there is any objection to allowing them to remain in the decree ; but lest they should be misinterpreted, it will be well to order, and we do order, that the words " the plaintiff is, therefore, entitled to a kubooleut for an annual rent of Rs. 102-7-7½, which shall run from the date of the suit" to be omitted from the decree of the first Court. The remainder of the decree will stand.

By saying that the defendant will be liable to pay the rent fixed so long as he continues to occupy the land, we do not mean to imply that he has any right of occupation, but only to state that so long as he does in fact occupy he will have to pay that rent. All that is here now done is that he is declared to be liable to pay the rent subject to any right which the plaintiff may have to enhance it or to put an end to the occupation.

Each party must pay his own costs of the appeal to this Court.

The 15th Decem ber 1874.

Present :

The Hon'ble Sir Richard Couch, *Kt*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Landlord and Tenant—Repairs—Agreement—Construction.

Case No. 1410 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Twenty-four Pergunnahs, dated the 7th April 1874, *affirming a decision of the Subordinate Judge of that district, dated the 25th July* 1873.

Anund Moyee Dossee and others (Defendants) *Appellants,*

versus

Kooer Raj Coomar Roy (Plaintiff) *Respondent.*

Mr. R. T. Allan for Appellants.

Baboo Bhugobutty Churn Ghose for Respondent.

Where certain premises were let under an agreement in which the tenant covenanted as follows :—" I will make the necessary repairs to the buildings at my own cost ;

Digitized by Google

if by reason of my not so repairing, any injury occur to a building or it become broken, I will restore it;" it was held that it would not be a fair construction to hold that if, whilst the buildings were in good repair, and the tenant had done all the necessary repairs, they were blown down or injured by a cyclone, the liability to restore them should fall upon the tenant. The agreement bound the tenant only to restore buildings which it became necessary to restore in consequence of his not repairing them.

Any loss occasioned by the natural operation of time ought to fall upon the landlord, and not upon the tenant.

Couch, C.J.—THIS suit was brought upon an agreement which is stated in the plaint to have been made upon the letting of certain premises by which the late Paboo Motee Lall Seal, whose heirs the defendants are, agreed that he would maintain all the boundaries of the garden which was let, and keep intact all the buildings and trees existing therein; that he would repair at his own expense, when necessary, the buildings, &c., existing therein; and that in case the buildings, &c., should be dilapidated or damaged for want of repairs, he would repair the same at his own cost.

The suit was heard in the first instance by the Subordinate Judge of 24-Pergunnahs, and there was an appeal from his decision, which is dated the 30th of May 1871. The then Officiating Judge of 24-Pergunnahs says in his judgment that the agreement was in these terms:—"I will preserve and maintain the "boundaries and limits of the garden, all the "trees and buildings, according to custom. I "will make the necessary repairs to the "buildings at my own cost; if, by reason of "my not so repairing, any injury occur to a "building or it become broken, I will restore "it;" and upon his construction of it he was of opinion that the decision of the Subordinate Judge was incorrect, and remanded the case for rehearing, laying down what he thought were the principles which should guide the Lower Court in assessing damages.

Upon this remand, the case was heard by another Subordinate Judge who made his decision on the 25th of July 1873, awarding to the plaintiff Rs. 3,000 as damages for breach of the agreement, and that has been confirmed by the present Judge of 24-Pergunnahs, who dismissed the appeal of the defendants against it with costs.

There is a special appeal to this Court, and the appellants, the defendants, now take exception, as they are at liberty to do, to the principles which were laid down in the order of remand. It thus becomes necessary for us to determine what is the construction of this agreement, and upon what principles the damages to which the plaintiff may be entitled ought to be assessed.

The words, "I will make the necessary repairs to the buildings at my own cost," if not followed by any others would create an obligation on the part of the tenants to do all repairs which might become necessary from any cause whatever, not only from the wear and tear of the buildings, but even repairs which might be rendered necessary by tempest or fire; because the words are general and the tenants engage to do the necessary repairs. But they are followed by the words, "if by reason of my not so repairing, any injury occur to a building or it become broken, I will restore it." These words seem to mean that the tenants were only to restore buildings which it became necessary to restore in consequence of their not repairing them. We think that it would not be a fair construction of this agreement to hold (and that it is not what the parties intended) that if, whilst the buildings were in good repair and the tenants had done all the necessary repairs to them, they were blown down or injured by a cyclone, the liability to restore them should fall upon the tenants, and not upon the landlord.

We have then to apply this construction to what it is contended by the defendants has happened. They say, it may or may not be true that the stable and atchala, which are the principal subjects of contention, fell down in consequence of a cyclone, and that they did the repairs to those buildings which were necessary having regard to the nature of them. Their case seems to be that the buildings were so very old that they could not be repaired any further, and were at last destroyed by the cyclone. The plaintiff does not admit this. His case is that the defendants did not make the necessary repairs, and that they are now liable to pay damages for not having done so. We cannot agree with what was laid down by the Officiating Judge. He said that the lessees were bound to make good all deteriorations and all injuries resulting from inevitable accident, and to keep in repair all the buildings and to restore them if they become broken, generally, and not with reference to the cause of their becoming broken.

It being, therefore, necessary that the case should be remanded, we have considered what questions should be stated for determination by the Lower Court. The first question is whether the defendants, during their occupation of the premises until the 23rd August 1869, that being the time when

Digitized by Google

they gave up possession, made all necessary repairs to the stables and atchala, having regard to their age and general condition on the 1st of May 1853, when the tenancy began. Although the lease expired before the 23rd of August 1869, the defendants remained subject to the same terms as were in the lease. But in considering what repairs they were bound to make, the Court must look at the age and general condition of the premises at the time the lessee entered upon the occupation of them.

The second question will be, if the defendants did not make the necessary repairs, whether the want of necessary repairs to the stable and atchala materially contributed to their falling down in June 1869, or at any other time during the defendant's occupation. If by the want of necessary repairs these building were in such a state that they could not resist the force of the cyclone, whenever it took place, in the way in which they would have resisted it if the necessary repairs had been made, the defendants ought to be made liable for the consequences. The way by which this can be done by the Court in dealing with any evidence may be pointed out. The Court, we think, should see whether the want of necessary repairs materially contributed to the falling down of the buildings. If it did, it is right and just that the defendants should be made liable for the cost of their restoration. But in considering what the defendants should pay as the cost of the restoration, we must look at this, that they are only bound to restore the buildings to the state in which they would have been if the repairs had been done. The plaintiff is not to have the benefit of new buildings. All that he is entitled to is to have the value of the buildings as if they had been kept in proper repair.

And the third question will be, if the want of repairs did materially contribute to the falling down of the stables and atchala, then what would it cost to restore them to the condition they would have been in if the repairs had been made, allowing for the natural operation of time during the occupation in diminishing their value. Any loss occasioned by the natural operation of time ought to fall upon the landlord, and not upon the tenant. This being estimated in the best way that the Court can do it, will have to be allowed for. And the way in which it would seem that it can be best estimated is by taking the cost of a new building, making use of the old material, and deducting from such cost the difference in value between the new building so erected and the value of the old building if it had been kept in necessary repair. This may be a difficult question for the Courts to determine, especially as we are afraid there will not be much evidence, but we can only point out what the questions are which must be determined in order to say what damages the plaintiff is entitled to recover in this suit.

Therefore the suit will be remanded in order that these questions may be determined, and a decree be passed according to the determination of them. Both parties will be allowed to give such evidence as they may think fit. The costs will follow the result.

The 16th December 1874.

Present:

The Hon'ble W. Ainslie, *Judge.*

Kudeemee or Mourosee Holdings.

Case No. 264 of 1874.

Special Appeal from a decision passed by the Judge of Purneah, dated the 13th November 1873, *affirming a decision of the Moonsiff of Arrariah, dated the 24th June* 1873.

Nund Coomar Bhuggut (Defendant) *Appellant,*

versus

Lukhee Pria Debia (Plaintiff) *Respondent.*

Baboo Tarucknath Dutt for Appellant.

Baboo Grija Sunkur Mojoomdar for Respondent.

Any limitation applicable to rights declared in Act X of 1859 and Act VIII (B.C.) of 1869, does not necessarily

Digitized by Google

extend to holdings which were in existence before those laws were passed, *e.g.*, kudeemee or mourosee holdings.

THE plaintiff in this case sues to eject the special appellant on the ground that he had called upon him to enter into a contract to pay a higher rent than he had been paying before, and that he had neglected or declined to do so. The special appellant appears to be the purchaser of half of the jote of Munnoo Bhuggut. This jote is described in the judgment of the first Court as undoubtedly a mourosee talook, and the Judge in speaking of *it*, referring to a judgment which was *made* in a rent suit on the 19th of May *1860*, speaks of it as having been declared by that judgment to be a kudeemee one. Further, the first Court is of opinion that that holding was transferable. On this point the Judge has not expressed an opinion one way or another. Notwithstanding this, both the Courts have come to the conclusion that the judgment of 1860 implies no greater rights than what, by Acts X of 1859 and VIII of 1869, are declared to exist in favor of persons who have occupied twelve years. The holding of Munnoo Bhuggut is shown by the judgment referred to, to have been in existence long before the Acts above referred to were passed; and any limitation applicable to the rights declared in the statute does not necessarily extend to holdings which were in existence at earlier dates. It seems to me that what is ordinarily understood by a kudeemee or mourosee holding is something very much larger than what is known as a right of occupancy under the rent law of 1859.

There being such a holding, and it being determined by the Court below that according to the custom of the country it is a transferable one, the purchaser takes the whole of the rights of the previous holder against the zemindar. On other grounds also, it is quite clear that the suit ought to be dismissed. The plaint does not show that the plaintiff at any time gave notice to the defendant of his intention to put an end to the tenancy which he admits the defendant to have, and till he has done this he cannot treat him as a trespasser and cannot sue to eject him.

The judgments of the Courts below must be reversed, and the suit dismissed with costs.

The 17th December 1874.

Present :

The Hon'ble W. Ainslie, *Judge.*

Joint Share-holders—Liability of Tenant.

Case No. 555 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Dacca, dated the 28th November 1873, *reversing a decision of the Moonsiff of that district, dated the 31st January* 1873.

Brijo Kishore Bhuttacharjee and others (Defendants) *Appellants,*

versus

Ooma Soonduree Debia (Plaintiff) *Respondent.*

Baboo Sreenath Banerjee for Appellants.

Baboo Bhowanee Churn Dutt for Respondent.

Where there has been no agreement by a tenant to pay any thing but a single rent to all the sharers jointly, no sharer can assume to himself a right to a separate payment for what he alleges to be his own share.

THE plaintiff, as the widow of Chunder Kishore Bhuttacharjee, sues the defendants to recover a certain share of the rent of the lands held by them. The ryot defendants pleaded payment to Brijo Kishore, another sharer, the brother of plaintiff's deceased husband. He was brought into the suit and made a defendant. He denied the right of the plaintiff, and also raised other questions as to the amount of the share. The finding of the first Court was that "there can be no "doubt that the rents payable by the tenant "defendant as well as by the other tenants "of the mehal have been collected jointly "from before, and the plaintiff cannot say "or show any thing to the contrary. There- "fore, so long as a joint tenant does not make "any agreement with any coparcener for the "payment of the rent in proportion to his "share, the tenant shall be absolved from "all liability on payment of his rent to any "one of his coparceners." The Moonsiff might very well have added that where there had been no agreement by the tenant to divide the rent or to pay any thing but a single rent to all the sharers jointly, no sharer can assume to himself a right to a separate payment for what he alleges to be his own share. The Lower Appellate Court has not noticed this part of the case at all. The Judge admits that Brijo Kishore

Digitized by Google

was in fact managing the property and receiving the rents, but he says that "the "ryots when they paid Brijo Kishore, if "they actually paid him" (he does not determine whether they in fact did so or not, although it appears there was evidence on the record on that point) "with a perfect "knowledge that he intended to appropriate "these rents for his own use, and that he "was not realizing them on behalf of his "sister-in-law: they paid therefore at their "own risk, and even if they have paid in "fact, must pay again to the rightful claimant, "for Brijo Kishore had no right to receive "the rent." The case must go back to him to try whether there was in fact any division of the rent, and if not, whether Brijo Kishore did not, as the person who had all along been the manager of the property, actually receive the whole of the rents for the period included in this suit. If he did so, and there was no division of the rents, it appears to me that the appellants have a good defence. The costs will follow the result.

The 17th December 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Act IX of 1847 *ss.* 6 *&* 9—*Alluvion—Right of Suit.*

Cases Nos. 252 and 253 of 1873.

Regular Appeals from a decision passed by the Judge of Dinagepore, dated the 30*th June* 1873.

The Collector of Moorshedabad on behalf of Government and another (Defendants) *Appellants,*

versus

Roy Dhunput Singh Bahadoor and others (Plaintiffs) *Respondents.*

Baboos Unnoda Pershad Banerjee and *Mohinee Mohun Roy* for Appellants.

Baboos Tarucknath Sen and *Sreenath Doss* for Respondents.

Act IX of 1847 was intended to apply only to a subject which was gained from the sea or from rivers by alluvion or dereliction; not to land seemingly gained from another proprietor by the changing of a river's course.

Where a piece of land so gained, is supposed by the Survey authorities to be an addition to a zemindaree, and is settled by the Revenue authorities with the zemindar, and an additional jumma assessed in respect thereof, so far as that addition is concerned the orders of the Revenue authorities are made final by s. 6; but they do not operate to take away the right of the proprietor from whom the land was gained, to seek by suit in a Civil Court to recover his property from the hands of those who are keeping it from him.

The words of s. 9 forbid a suit against Government or its officers for damages on account of any thing done in good faith in the exercise of the powers conferred by this Act; but they do not forbid a suit to recover property which, either Government or its officers, may be keeping away from its rightful owner.

Phear, J.—THE essential facts of the plaintiff's case are, that the property which is the subject of suit originally formed part of his zemindaree Sultangunge in the district of Muldah, was surveyed by the Revenue authorities as being a portion of that zemindaree in the year 1847, and was from that time onwards until the year 1261 or 1262 possessed and enjoyed by him, the plaintiff, as a substantive portion of Sultangunge. About that time, the Ganges by changing its course flowed over and submerged this portion of the plaintiff's zemindaree; and this land remained submerged for 2 or 3 years until the Ganges, by a further change in the same direction as before, allowed it to emerge from the waters on the other side, so to speak, of the river. And in this state it became attached to mouzah Gobindrampore, part of the zemindaree of the 2nd defendant, Rao Jogendro Narain Roy. After this occurrence, the plaintiff regained possession and enjoyment of this piece of land to a certain extent, when he was dispossessed by Mr. Thomas Lyon acting under the authority of an ijarah lease, which he had obtained from the defendant Jogendro Narain Roy.

At this stage of matters, the Survey authorities come upon the scene, and finding this piece of land added to the zemindaree of Jogendro Narain, they took proceedings under Act IX of 1847, and assessed an additional jumma in respect of this land against Jogendro Narain Roy.

The plaintiff complains in this suit, which he has brought against the Government, Jogendro Narain, and Mr. Lyon, that by these proceedings on the part of the Government, the zemindar and the ijaradar jointly, he has been wrongly dispossessed of the property for which he sues.

The Government do not on this appeal seriously contest the facts of the case as alleged by the plaintiff, but maintain that the revenue proceedings taken under Act IX of 1847 had the effect of concluding the matter not only between Government and Jogendro Narain Roy, but between Government and every body else, including the present plaintiff, and that this suit will not lie.

Digitized by Google

The defendant Jogendro Narain Roy disputes the principal allegations of the plaintiff. But Mr. Lyon does not appear in this appeal.

We do not think it necessary to discuss in detail the evidence which has been given by the plaintiff. The Lower Court has arrived at the conclusion upon that evidence that the principal facts alleged in the plaint are completely established. And we see no good reason for differing from the Judge upon this point.

It is almost beyond question that the land which is the subject of suit was included within the zemindaree of Sultangunge as surveyed in 1847. It seems from the report of the ameen that this land can be distinctly identified as forming a portion of the land which was mapped in 1847; and we think that the plaintiff has, by his evidence, satisfactorily made out that until at any rate 1862 or 1863, when the Ganges passed over the land, he had enjoyed it as a portion of his zemindaree. The witnesses speak to a limited amount of occupation and enjoyment of this land even after the Ganges had again shifted its course, so as to allow this land to emerge from the waters, and we see no good reason for doubting the substantial truth of their testimony in this matter. There is nothing of any weight to be put against it. And, on the whole, it appears to us that we should not be justified in disturbing the finding of the Lower Court with regard to the facts of the case. This being so, it follows that as against Jogendro Narain and Mr. Lyon, the plaintiff has made out a good title to this property.

And the question next arises,—is he, by reason of the survey proceedings under Act IX of 1847, barred from recovering his property from the hands of these defendants on the strength of his title? His suit is not barred by the operation of the ordinary Acts of limitation, because according to the facts which we think are undoubtedly established, he had actual enjoyment of it long within the period prescribed by those Acts for the limitation of suits. The question whether the proceedings taken under Act IX and the final decision come to by the Commissioner upon those proceedings had the effect of barring the plaintiff from bringing this suit even against the trespassers Jogendro Narain and Mr. Lyon, depends upon the proper interpretation of Act IX of 1847.

The Act itself is entitled "An Act regarding the assessment of lands gained from the sea or from rivers by alluvion or dereliction within the provinces of Bengal, Behar, and Orissa." And to some extent this marks out the scope of the Act. From these words, we should gather that it was intended to apply only to a subject which was gained from the sea or from rivers by alluvion or dereliction, not to land, seemingly gained from another proprietor by the mere changing of a river's course. And the words of the preamble tend in the same direction. The Act then goes on to provide that periodical surveys of lands on the banks of rivers and on the shores of seas shall be made in order to ascertain the changes that may have taken place since the date of the last previous survey, and new maps shall be made from time to time.

In Section 5 it is enacted "that whenever "on inspection of any such new map, it shall "appear to the local Revenue authorities "that land has been washed away from or "lost to any estate paying revenue directly "to Government, they shall, without loss of "time, make a deduction from the sudder "jumma of the said estate equal to so much "of the whole sudder jumma of the estate as "bears to the whole, the same proportion as "the mofussil jumma of the land lost bears "to the mofussil jumma of the whole estate, "&c."

And in the sixth Section, it is enacted "that whenever, on inspection of any such "new map, it shall appear to the local Rev-"enue authorities that land has been added "to any estate paying revenue directly to "Government, they shall, without delay, "assess the same with a revenue payable to "Government according to the rules in force "for assessing alluvial increments, and shall "report their proceedings forthwith to the "Sudder Board of Revenue, whose orders "thereupon shall be final."

It seems to be very clear that the action which the Government of Bengal is empowered to take by this Act, has direct reference to the land which is at any time found in the possession of a zemindar and enjoyed by him as a part of his zemindaree bordering on the sea or on a river apparently gained therefrom. When the land so possessed by him is found by a comparison of the new map with the old map to be in excess of what he had previously been possessed of as constituting his zemindaree, the Government is empowered to make an addition to the jumma which is payable by him in respect of his zemindaree. And all orders that may be made by Government in this matter are, by the words of Section 6, rendered final, that is,

Digitized by Google

as regards the person whom they may directly affect, namely, the zemindar.

In the case which is before us, as has been already stated, the plaintiff complains that the principal defendant Jogendro Narain Roy has, under cover of the Government Survey proceedings, taken away from him a portion of his property. And, no doubt, the Survey authorities when they made the new survey in 1866-67, were led by some means to suppose that this piece of land, which the evidence given before us shows to be land belonging to the plaintiff, was at the time of the new survey possessed and enjoyed by Jogendro Narain as part of, or as land added to, his zemindaree. And upon that state of facts it was settled with him, and an additional jumma was assessed in respect of it upon his zemindaree. So far as that addition to his jumma is concerned, the orders of the Revenue authorities are made final by Section 6 Act IX of 1847. But so far as the assumption of fact made by the Revenue authorities to the effect that this piece of land was land which had been gained by Jogendro Narain from the river by alluvion is concerned, there was no actual order made. And we think it never was the intention of the Legislature that any order or declaration which might be considered as implied in that respect by reason of the formal settlement of the land with Jogendro should be made final by the words of Section 6 against 3rd parties. So that, in our view, the order which was passed by the Revenue authorities in 1866-67, assessing this additional jumma upon the zemindaree of Jogendro Narain, does not operate to take away the right which the plaintiff has, to seek by a suit in the Civil Court to recover his property from the hands of those who are keeping it from him.

But it is further said that Section 9 of this Act IX of 1847 bars the suit. The Section runs in these words:—"And it is "hereby enacted, that except as regards the "proprietary right to islands, no suit or "action in any Court of justice shall lie "against the Government or any of its "officers, on account of any thing done in "good faith, in the exercise of the powers "conferred by this Act."

And it is argued that the plaintiff is by these words barred from bringing a suit against the Collector, as representative of Government, to recover this property, and if barred against the Collector, he is also barred from bringing his suit against Jogendro Narain Roy and Mr. Lyon, who have had this property settled with them by the action of the Revenue authorities.

It does not appear to us that this argument ought to prevail in its entirety at any rate. In the view we have taken of the facts, it is perhaps not necessary for us to express a judicial opinion as to whether the words of this Section would bar a suit of this kind from being brought against the Government, if the property sought to be recovered was actually in the hands and under the control of the Government. Speaking for myself alone, I may say that I do not at present see any reason to alter the view which I expressed on a former occasion with regard to the meaning of an enactment somewhat similar to this Section, namely, a portion of Section 87 of the Municipal Act (III of 1864 B.C.) To me the words of this Section seem to be limited to forbidding a suit wherein the plaintiff seeks to make Government or any of its officers responsible in damages on account of any thing done in good faith in the exercise of the powers conferred by this Act, and do not necessarily extend to forbidding a suit which is brought to recover property which, either the Government or its officers, might be instrumental in keeping away from the rightful owner. And it seems to us that the exception as regards the proprietary right to islands, strengthens this view.

But, however this may be, we think that upon the facts of this case and the evidence which has been given, the plaintiff's suit so far as concerns the Government fails. Neither the Collector nor the Revenue officers have done any thing to take the property out of the hands of the plaintiff or to keep it away from him. Under Act IX of 1847, the Revenue officers could not rightly take action until they found the land which was sought to be assessed in the hands of the zemindar to whose zemindaree it seemed to be added; obviously the land must be added to the zemindaree before the new assessment in respect of it can be made. And it appears to us upon the evidence in this case that in the new survey of 1866 and 1867 by which this land was thakked with the zemindaree of the defendant, Gobindrampore, the proceedings were taken by the Revenue officers *bonâ fide*, upon the land being ascertained by them to be in the possession of the defendant or of his people. They did not themselves deprive the plaintiff of possession of the land, or assist the other defendants in keeping him out of it. Neither did they by making the new settlement, pretend to deal with the land and

Digitized by Google

convey it to Jogendro Narain adversely to the plaintiff's rights. In short, the plaintiff has not satisfied us that the Government has directly invaded or hostilely threatened his proprietary right, and has not shown any good cause for our making a judicial declaration of his right as against it. Therefore the decree in favour of the plaintiff in this suit ought to be limited to a decree against the defendant Jogendro Narain Roy and Mr. Lyon. In our view, the suit as against the Collector, representing the Government, ought to be dismissed. In ordinary course this would be with costs, but regard being had to the defence which has been unnecessarily set up on the part of the Government, not only in the Court below but in this Court, that is, to the effect that the action taken by the Government had the effect of transferring the property from the hands of the plaintiff to the defendant, we are of opinion that the Government is not entitled to its costs.

We think that as regards the defendant Jogendro Narain, the appeal should be dismissed with costs and the decree of the lower Court affirmed, but as regards the Government the decree of the Lower Court must be reversed and the suit dismissed without costs.

We do not think we ought to interfere with the order made in the Lower Court directing Jogendro Narain to pay the costs of Mr. Lyon. The appeal of Jogendro Narain on this point is also dismissed, but without costs, as Mr. Lyon does not appear.

The 21st September 1874.

Present:

The Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

Execution—Instalments.

Case No. 225 *of* 1873.

Miscellaneous Appeal from an order passed by the Judge of Nuddea, dated the 10th April 1873, *reversing an order of the Subordinate Judge of that district, dated the 1st July* 1872.

Tincowree Dossee (Decree-holder) *Appellant,*

versus

Umbika Churn Roy Chowdhry and others (Judgment-debtors) *Respondents.*

Baboo Tarucknath Dutt for Appellant.

Baboo Hem Chunder Banerjee for Respondents.

A decree directing payment by instalments ought to be executed to the extent of the instalments falling due within three years before the application for execution.

Jackson, J.—THIS case was heard by Mr. Justice Ainslie and myself in the month of December last, and as the date shows we have taken a good deal of time to consider our decision. I confess it is a matter which to me is not without difficulty. I must say that I am not entirely satisfied with the reasons given by the Court in the cases which were cited to us from XI Weekly Reporter, page 570, and XV Weekly Reporter, page 547, and if the matters were now before us as *res integra*, I should be inclined to consider, however hard and constrained a view it might seem, that we were compelled by the terms of Section 20 Act XIV of 1859 to say that execution could not be allowed on a decree in respect of which no proceeding had been taken to keep it alive or enforce it within three years next before the application; and I confess I am not very much pressed by the hardship as regards the plaintiff, who had utterly neglected and had slept over his rights for much more than the whole period of limitation prescribed by that law, and my indisposition to assist him is further increased in the present case by the fraudulent representation made to induce the Court to overlook the nine or ten years' delay in order to bring plaintiff within the period of limitation; still it cannot be doubted that the view taken by Mr. Justice Norman in the case in XI Weekly Reporter, page 570, and that taken in XV Weekly Reporter, page 547, and also by a Full Bench of the Agra High Court and in IV Madras Reports, page 173, and likewise upon a point very nearly similar by the Bombay High Court, pages 38 and 45* are opposed to the view that I entertain; and against this current of authority I do not think I should be justified in giving weight to the opinion which I have been inclined to hold upon the subject; and as my brother Ainslie's opinion is also that execution ought to be allowed to proceed, I think it must be so, and that consequently the decree-holder's appeal ought to be allowed with costs, Rs. 20.

Ainslie, J.—I concur in the order made.

---

* Vol. 6.

Digitized by Google

The 1st December 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Benamee Transaction—Estoppel.

Case No. 1261 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 31st March 1874, *reversing a decision of the Moonsiff of Raneegunge, dated the 21st August* 1873.

Gopeenath Naik (one of the Defendants) *Appellant,*

versus

Jadoo Ghose (Plaintiff) *Respondent.*

Baboo Biprodass Mookerjee for Appellant.

Baboo Rash Beharee Ghose for Respondent.

Follows ruling in 21 W. R., 424, in which it was decided that parties are not precluded from showing what is the real nature of a transaction, although it may have been entered into for the purpose of setting up against creditors an apparent ownership different from the real ownership.

Markby, J.—It is unnecessary for us to decide whether the ruling in the 13th Weekly Reporter, p. 87, is or is not applicable to this case. We adopt the view of the law which is taken by the first Bench in the case reported in the 21st Weekly Reporter, p. 424, Sreemutty Debia Chowdhrain, appellant, *v.* Bemola Soondaree Debia, respondent; and upon that view of the law, we think that the Subordinate Judge's decision is right.

The special appeal is dismissed with costs.

The 7th December 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Evidence — Limitation — Declaratory Suit—Adoption—Fraud—Act I of 1872 *s.* 33—*Act XIV of* 1859 *s.* 1 *cl.* 16.

Case No. 275 of 1873.

Regular Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 4th August 1873.

Mrino Moyee Debia (Plaintiff) *Appellant,*

versus

Bhoobun Moyee Debia and another (Defendants) *Respondents.*

Mr. J. T. Woodroffe for Appellant.

Mr. J. W. Lowe for Respondents.

B M, as the widow of H, and adoptive mother of the minor S, brought a suit against M M, describing her as the widow of R N, and ignoring the existence of D N (an adopted son of R N) in whom was vested the interest of the property of which M M was only a manager.

Subsequently, after D N's death, M M adopted another infant N N, and on his behalf, as the expectant successor, on the death of B M, to the property of H, brought a suit against B M for a declaration of the invalidity of the adoption of C K.

HELD that the latter suit was not between the representatives in interest of the parties in the former suit, and a deposition made in the former was not admissible in the latter.

Act XIV of 1859 s. 1 cl. 16 applies to a declaratory suit; and where the suit is to have an adoption declared invalid, the only exception to limitation beginning to run from the date of the adoption which is the cause of the action, is that provided in s. 9,—namely, the right of action being concealed by means of fraud.

THE following decision was passed on the 27th November 1874, upon the objection taken by Mr. Woodroffe that the deposition in the former suit by Bhoobun Moyee could not be received in evidence in this suit; the suit not being between the same parties or their representatives in interest:—

Couch, C.J.—We think the deposition ought not to be received. The 33rd section of the Evidence Act provides that in order to make a deposition admissible, the proceeding in which the evidence has been given by the witness must be between the same parties or their representatives in interest. The present suit is in reality a suit by Nugendro Narain by Mrino Moyee, his mother and guardian. The right to have a declaration of the invalidity of the adoption of Chunder

Digitized by Google

Kishore is a right which is in Nugendro as the expectant successor, upon the death of the widow Bhoobun Moyee, to the portion of the property that belonged to Hurendro. The suit in which the evidence was given was brought by Bhoobun Moyee, as the widow of Hurendro and adoptive mother of the minor Shibendro, against Mrino Moyee, describing her as the widow of Romendro Narain, and taking no notice of the fact that at that time there was in existence an adopted son of Romendro, namely, Debendro Narain. When we look at the terms of the unoomotee-puttro executed by Romendro, we find that the interest in the property rested upon the adoption in the adopted son, and that what Mrino Moyee had under that deed was only a power of managing the property and continuing in possession of it during the minority of the adopted son. The estate was in the person who had been adopted; and Bhoobun Moyee on that occasion thought fit to sue a person who had not a widow's interest in the property and was not in a position to represent the estate in the manner in which a Hindoo widow has been held to do. Therefore it appears to us that it cannot be said that the plaintiff in the present suit, the infant who has been adopted by her after the death of Debendro, is a representative in interest of Mrino Moyee, the party to the former suit.

It is not necessary for us to say what would be the case if, at the time of the first suit, there had been no adopted son in existence, and Mrino Moyee at that time had had a widow's estate in the property; or, if instead of the suit being brought, as it was, against Mrino Moyee in her own right, it had been brought against her as the mother and guardian of Debendro, the then adopted son. We will only say that when such a question as that arises, as it probably will some day, the rule of the English Law of evidence by which where there were several remainders limited by one deed, a judgment for or against one of them would be evidence for or against the next in succession may be considered; because he does not claim under the first remainderman, but under the deed which is the title of both. This is probably the nearest analogous case in the English Law to that of sons successively adopted, or of a suit brought against a widow before any adoption, and an adoption being made afterwards. At present we need only decide that from the manner in which Mrino Moyee was sued in the first suit, it cannot be said that the present suit is between the representatives in interest of the parties in the former suit. For that reason we think that the deposition cannot be received.

The Court then proceeded to hear the case on the issue of limitation, and generally on the merits. The judgment of the Court was delivered as follows by—

Couch, C.J.—This suit was brought by Mrino Moyee Debia, the widow of Romendro Narain Adhikaree, and the mother and guardian of the minor Nogendro Narain Adhikaree, against Bhoobun Moyee Debia, the widow of Horendro Narain Adhikaree, and Chunder Kishore Gossamee, described as being generally known by the name of Shibendro Narain Adhikaree; and the plaint prays that the allegation of an adoption made by the defendant Bhoobun Moyee Debia, of the defendant Shibendro Narain, may be declared to be false, the reversionary right of Nogendro Narain being thereby injured.

The allegations upon which the suit is founded are that Horendro Narain Adhikaree was the nephew of Romendro Narain Adhikaree, the husband of the plaintiff, Mrino Moyee Debia; that Horendro Narain died on the 4th of Joist 1261 without leaving issue, and that the defendant Bhoobun Moyee had given out that she had adopted the second defendant as her son, but the plaintiff alleged that Horendro Narain never gave any permission to adopt nor executed any deed, and also that the husband of Huro Soonduree Debia, the mother of the person adopted, and who gave him in adoption, did not empower her to do so.

The first question to be determined is whether the suit is barred by the law of limitation.

The Subordinate Judge, who has decided against the plaintiff and dismissed the suit, has in a manner decided this question, but he also gave his decision upon the other question, namely, whether the second defendant, Shibendro Narain, was lawfully adopted.

Horendro Narain died on the 16th of May 1854, and the alleged permission to adopt, the unoomotee-puttro, is dated the 14th of May 1854. According to the evidence, Shibendro Narain was taken by Bhoobun Moyee to the family house and treated as the person who was to be adoped by her, having been named in the unoomotee-puttro; but the adoption was not completed until the 19th of May 1856.

If this case is governed by the law of limitation, it is by Act XIV of 1859. The

Digitized by Google

words of Clause 16 of Section 1 of that Act are so general that we can see no ground for saying that a declaratory suit such as this is, namely, to declare that there is no valid adoption, does not come within it. They are :—"To all suits for which no other limitation is hereby expressly provided, the period of six years from the time the cause of action arose." The intention of the Legislature seems to be to provide a limitation for every suit. Having stated certain periods for different suits by the previous clauses, the last clause of the first Section says that to all suits for which no other limitation is provided, the period is to be six years from the time when the cause of action arose. There are several cases in this Court in which it appears to have been considered that the law of limitation would apply to a declaratory suit, but we are not aware of any case in which it has been expressly decided. In many cases it would be unnecessary to decide it, as the Court in the exercise of the discretion which it has would decline to make a declaratory decree, even if a lesser time had elapsed before bringing the suit, unless there were special circumstances.

We think, therefore, that the 16th Clause does apply to a suit of this description, and then the only exception to the time beginning to run from the date of the adoption, which is the cause of action in a suit to have it declared invalid, is that which is provided in Section 9, namely, the right of action being concealed by means of fraud. Here, there is no evidence that the adoption which was made by Bhoobun Moyee after the death of Romendro, who died on the 6th of July 1855, was in any way concealed from Mrino Moyee. The cause of action, therefore, arose then, and the period of limitation would then begin to run. There is no evidence that Mrino Moyee had before that made any adoption under the power which it is admitted she had from Romendro. The plaintiff Nogendro is a secondly adopted son. There was a previously adopted son who died, namely Debendro, but in the absence of any evidence of the time when his adoption was made, we cannot assume an affirmative in favor of the plaintiff, namely, that it was made before July 1856. So far as there is any evidence, it appears that it had not been made at that time. Therefore, on the 19th of May 1856, when the cause of action arose, Mrino Moyee was entitled to and in possession of the property of Romendro. Whether she was the person who, if Bhoobun Moyee died without making any valid adoption, would succeed to the share of Horendro need not be determined. There was no minor in existence who had the right so as to make the provision in the law of limitation in favor of minors applicable. Whether the right to bring such a suit as this, upon the adoption being set up by Bhoobun Moyee, was in her or in some other person, is not material. It is sufficient that it does not appear that the right was in a minor.

Therefore it appears to us that in this case the cause of action upon which the present suit is founded, it being merely a suit to declare the adoption invalid, arose on the *19th* of May 1856 : and this suit was brought much beyond six years, and even beyond twelve years, if that period could be made applicable. We, therefore, think it is barred by the law of limitation. But as the Subordinate Judge also decided the question whether a valid adoption was proved by the defendants, it is desirable that we should give our decision upon it.

The plaintiff impeached the adoption upon two grounds : first, that Horendro Narain gave no permission to his wife to adopt a son; and secondly, that the father of the boy who was adopted did not give to his wife Huro Soonduree permission to give the boy in adoption.

The permission relied upon by the defendants is set out at page 1 of the second appendix and is dated the 14th May 1854, being two days before the day on which Horendro Narain is said to have died. It appears to be attested by nineteen persons, of whom fourteen are said by the witnesses for the defendants to be dead, and there is no evidence on the part of the plaintiff contradicting this. Of the remaining five, one Jhogra Mundul, is said by the defendants to be also dead, but the plaintiff not only says that he is not dead, but has called as a witness one Jhogra Mundul who, she says, is the man whose name appears in the unoomotee-puttro; and he says that he never attested it.

The plaintiff also called Rajendro Narain Sircar, whose name appears as one of the attesting witnesses. He said that he did not attest it at the time when, according to the defendant's case, it was executed by Horendro ; but that 13 months after Horendro's death (he first said Romendro's, but he corrected himself and said 13 months after Horendro's death) Bhoobun Moyee sent for him and told him to write his name down as a witness to the deed of permission ; *that*

Digitized by Google

upon that he said, "there is no deed; how shall I write myself as a witness," and Bhoobun Moyee said "you must subscribe yourself as a witness;" and then the witness said "I did not know what to do. Bhoobun Moyee became pressive. Upon that I subscribed myself as a witness."

The defendants called the other three persons whose names appear on the instrument, namely, Jadub Chunder Sircar, Ram Purshad Sircar, and Hakim Sircar, and they gave evidence of the execution of the unoomotee-puttro by Horendro. If they are to be believed, it was executed by him on the day it bears date.

The evidence of Rajendro Narain Sircar is open to the remark that by his own account he was guilty of a serious offence, namely, of putting his name as an attesting witness to the execution of an instrument by Horendro long after Horendro had died, of being in fact a party to fabricating a forged document.

The plaintiff, beside calling these two witnesses, has endeavonred to show that the unoomotee-puttro cannot be genuine, because Horendro Narain for some days before he died, including the time when it is said to have been executed, was in such a state of fever that he was incompetent to execute it. If what the witnesses said be true, it greatly affects the case of the defendants.

But there is another part of the case which is most material to be considered in determining whether this unoomotee-puttro is genuine or not. That is the conduct of Romendro Narain, the uncle of Horendro and head of the family, and the person who would have a great control over the family affairs after Horendro's death, it being proved that Bhoobun Moyee was not more than 16 or 17 years of age, and according to some of the witnesses not more than 13 or 14.

On the 10th of July 1854, a little less than two months after the death of Horendro, a petition was presented by Bhoobun Moyee with reference to a suit which was then pending in appeal against the decision of the Sudder Ameen's Court, in which suit it would seem that Horendro and Romendro, his uncle, were the plaintiffs, and Prosunno Nath Roy was the defendant. In that petition Bhoobun Moyee stated that her husband had granted her a deed of permission to make an adoption of a son, and died on the 4th of Joist 1261, leaving her as his representative, and asked that proofs might be taken from her as the rightful representative of the deceased, and that she might be substituted as the appellant in his stead. It is true that, whether there was a permission to adopt or not, she would have been the person to be substituted as the representative of Horendro in that suit; but although she was entitled at that time as the widow to be the representative of Horendro, it was only natural and proper for her to state that her husband had authorised her to adopt.

It is difficult to believe that Romendro occupying the position he did, and being a co-plaintiff in this suit, was ignorant of this petition, and that he did not know that Bhoobun Moyee had alleged in it that her husband had given her permission to adopt. And if he did know that, it is extremely difficult to believe that he would have allowed it to pass uncontradicted and would not have presented some petition to the Court denying that allegation, so that it might not afterwards be used against him, or against those who might claim a right to the property through him. Experience teaches us that persons are exceedingly ready to take exception to statements of this kind, statements in proceedings in Court which might at some future time be used against or may affect them. Romendro did nothing of the kind. Bhoobun Moyee appears to have been made a party to the suit upon this petition, and it appears to have proceeded. We have an order of the Court that Bhoobun Moyee should be admitted as the rightful representative of her husband as appellant, and the case should proceed to hearing in the presence of the petitioner.

That Romendro was aware, soon after the death of his nephew, that Bhoobun Moyee intended to adopt the second defendant as son to her deceased husband, appears from the evidence of the witnesses called by the plaintiff. Some of them said that the boy was brought to the house as the son about to be adopted, and that Romendro asked about it. They would have the Court believe that he was satisfied with saying that there was no deed of permission to adopt, and that he allowed the boy to remain in the house with Bhoobun Moyee. In fact he did remain from that time. It cannot be supposed that Romendro, when the boy was brought to the house, did not enquire into what had been done by Horendro before he died, and learn whether there was any foundation for the assertion that Bhoobun Moyee had authority to adopt a son. If he was satisfied that there was no such authority, it is very unlikely that he would have acted as the plaintiff's witnesses describe him as acting,

Digitized by Google

simply saying that there was no deed of permission to adopt, and allowing persons to conduct themselves in the same way as if there was a deed, and doing this until he died, which was more than a year afterwards. We think the witnesses of the plaintiff, so far as they describe him as saying that there was no permission to adopt, cannot be relied upon. We think that his conduct can be depended upon as a guide to the truth much more than the statements of these witnesses. And his conduct in taking no measures whatever to dispute the assertion of Bhoobun Moyee up to the time of his death, which was on the 6th of July 1855, is strong evidence in support of the witnesses who have deposed to the execution of the unoomotee-puttro by Horendro, and can be relied upon much more than the evidence which has been given on the part of the plaintiff of the state of health of Horendro. It is true that the Doctor who is said to have attended him on that occasion has not been examined, and it does not clearly appear whether he could now be called. It is an omission on the part of the defendant not to show that he cannot be examined, but we think it ought not to have any particular weight with us, because the plaintiff might have enquired about this gentleman, and, if he could be found, have produced him. The probability is that he is not now alive and cannot be produced. We are enquiring into matters which took place twenty years ago, and the case is open to the remark that the plaintiff, if she wished to have a declaration that the adoption is invalid, might have brought the suit at an earlier time.

But it is not only the conduct of Romendro which we have referred to that is important. There is also the conduct of Mrino Moyee, the plaintiff, after the death of her husband. He died, as we have said, on the 6th of July 1855. On the 16th of May 1856, it appears that a petition of Fukeer Mahomed Mundul was presented to the Deputy Magistrate. It purports to be on the part of Mrino Moyee, and alleges that there was no deed of permission in favor of Bhoobun Moyee to adopt a son; that she had attempted and still attempts to take a son fraudulently into adoption, and "because from fear that my "employer has a deed of permission (of her "husband) to adopt a son, and that the said "adopted son will necessarily become the "rightful proprietor of all those properties, "and because my employer is not at home, "—should Bhoobun Moyee adopt a son, in "that case it will hereafter be injurious to "the rights of the adopted son of my "employer, therefore I file this petition. "I pray that a perwannah be issued to the "Darogah of thannah Handeal to stop the "adoption of the fraudulent son by Bhoobun "Moyee."

From this it would appear that Mrino Moyee had not at that time made any adoption. If she had, we should expect to find it stated. Whether Fukeer Mundul had authority from Mrino Moyee to present this petition, or presented it without, does not appear. He says he did it as his employer was not at home.

The adoption was completed on the 19th of May 1856, three days after the date of this petition, and it does not appear that from that time until 1859 Mrino Moyee took any measures to question the right of Bhoobun Moyee to make it. Indeed, we find that on the 3rd of March 1860, Mrino Moyee, being described as the widow of the late Romendro Narain Adhikaree and mother of Debendro Narain Adhikaree, a minor, and Bhoobun Moyee being described as the widow of the late Hurendro Narain Adhikaree and mother of Shibendro Narain Adhikaree, a minor, join in a vakalutnamah, in which it is stated:— "It is necessary to institute a suit against "Issur Chunder Mytro, manager on part of "Huro Soonduree Debia and Surno Moyee "Debia, widows of the late Madhub Chunder "Sannyal, on account of recovery of a sum "of money in tumusook, dated 3rd Choitro "of the year 1254, executed by the above-"mentioned Sannyal. Therefore, we appoint "Baboo Jadub Chunder Bagchee and Baboo "Gobindonath Sen and Baboo Sreenath "Roy, pleaders of the Court, as our pleaders. "The said pleaders will institute the suit "and conduct the case." Here, Mrino Moyee is joining in appointing pleaders for a suit to be jointly brought by her as the mother of Debendro Narain and by Bhoobun Moyee as the mother of Shibendro Narain, the boy who had been adopted by Bhoobun Moyee. And it is certainly a significant fact that Mrino Moyee did join Bhoobun Moyee in this way in bringing the suit.

Then on the 13th of May 1860, there is a written statement of the plaintiffs, namely, of Mrino Moyee described as the mother of Debendro Narain Adhikaree, a minor, and Bhoobun Moyee described as the mother of Shibendro Narain Adhikaree, a minor. They both join in it and say that they declare that what is stated is to the best of their belief correct.

Digitized by Google

Again, on the 9th of June 1860, another document was executed. It appears that arbitrators had been appointed to make a partition of the property; and a schedule of the documents was prepared, one part purporting to be a schedule of the documents belonging to Mrino Moyee and the other of the documents belonging to Bhoobun Moyee. It is headed "schedule of documents parti- "tioned by arbitrators appertaining to Mrino "Moyee, mother of Debendro Narain Adhi- "karee, minor, and Bhoobun Moyee, mother "of Shibendro Narain, minor, inhabitants of "Dwareecooshee," and bears the signature and seal of Mrino Moyee to a receipt for her documents, and an undertaking to produce them whenever they should be required. If any effect is to be given to documents executed by persons here is a recognition by Mrino Moyee that there was a partition of the property, and that the share which belonged to Horendro then belonged to Bhoobun Moyee, as the mother of Shibendro Narain, a minor. When the widow of a deceased Hindoo is described as the mother of so and so, a minor, it means that she is acting as the mother and guardian of the minor, and that the name of the minor is introduced for that purpose. We have thus a very clear recognition by Mrino Moyee of the adoption which had been made by Bhoobun Moyee.

But there is a judgment of the 29th of November 1859, which shows in what way the question of the validity of the adoption was first raised. A suit had been brought by Bhoobun Moyee against Mrino Moyee and other persons, to set aside some instruments which had been executed by Romendro Narain, and it appears from the judgment that one of the issues which had been settled was,—did the husband of the plaintiff grant her an unoomotee-puttro, or not, and is the plaintiff competent to institute a suit under the terms of that unoomotee-puttro, or not? The Principal Sudder Ameen found that it was proved satisfactorily that Horendro Adhikaree did execute the deed of permission in favor of his wife as she alleged. Subsequently, Grish Chunder Lahiree, one of the defendants, made an application alleging that the decision had been given in his absence and asking for a rehearing. He appears to have alleged that there was collusion between Mrino Moyee and Bhoobun Moyee when the decision was given. The Principal Sudder Ameen then, upon the same issue,—had the husband of the female plaintiff executed a deed of permission in her favor as alleged by her,—came to an opposite conclusion to what he had in 1859, and held that the deed of permission was not executed. His reasons do not appear to be very satisfactory, and finding as we do that he had been of a different opinion at one time, we do not think any weight should be attached to his second opinion. But that decree was afterwards upon an appeal set aside by the Judge on the ground that the issue which had been raised as to the deed of permission was unnecessary and in fact irrelevant, for whether there was a deed of permission to adopt or not Bhoobun Moyee, as the widow of Horendro, would have a right to bring a suit to question the validity of the deed, and the parties appear, in some way not explained, to have had the issue as to the existence of the deed of permission raised. Here we find Mrino Moyee, notwithstanding what was going on in this suit at the instance of the other defendant, acting with Bhoobun Moyee as if she were the mother and guardian of the adopted son Shibendro Narain. And from that time nothing appears to have been done until the present suit was brought.

Mr. Woodroffe suggested that Mrino Moyee having got the decision of the Principal Sudder Ameen on the second occasion against the validity of the deed, might have been satisfied with that and thought it unnecessary to bring a suit to have the adoption declared to be invalid. The present suit shows that she has been advised that that is not sufficient; and we have no satisfactory explanation of what has been done during the interval between 1860 and when this suit was brought. Therefore the inference from Mrino Moyee's conduct also supports the case of the defendants that there was a deed of permission from Horendro. There is also the probability that Horendro, although a young man, would, if his illness was not so severe as to render him incapable of doing it, give such a permission.

On the whole, it appears to us that the defendants have sufficiently proved the genuineness of this unoomotee-puttro in answer to the suit by the plaintiff who asks to have it declared that there was no such permission, and in fact, if on any future occassion, the question should be raised between these parties, to establish the fact of the permission.

The other question raised by the plaintiff is whether there was a permission by the father of the boy to give him in adoption.

It being established that Horendro did execute the unoomotee-puttro, that instrument may be used to some extent upon this

Digitized by Google

question. The statement in the unoomotee-puttro by Horendro is not evidence against the plaintiff, who is no party to this instrument and does not claim under Horendro; but the instrument shows, and is evidence of this, that Horendro gave his wife permission to take the person named in it, *viz.*, Chunder Kishore, the third son of Huro Soonduree, in adoption. He gave her permission, not to adopt a son generally, but to take in adoption a certain person named. And his doing that is evidence that he knew at that time that the person could be taken in adoption. If Huree Kishoree was dead, it would show that he believed that his widow had power to give the son. We cannot suppose that he would limit his wife to adopting a particular individual, unless he knew that that person could be adopted. It is, therefore, fair to infer that Huro Kishore had given his wife permission.

But it does not rest solely on this evidence. The wife Huro Soonduree was called as a witness. She deposed to her husband having given the permission, and she is supported in this by the evidence of one of the witnesses for the plaintiff—Bishoonund Gossamee—who said that Huree Kishore Gossamee was his kinsman, and that Huree Kishore in his lifetime mentioned to the witness that he would give his son away for adoption, when the witness said:—"It is "not the custom in our family to give away "a son for adoption: we will not take our "meals with you." Upon this, Huree Kishore, he said, withheld giving permission for giving away his son for adoption. This shows that Huree Kishore had an intention of giving his son away, and agrees with what was done by Horendro. The witness, it is true, says that he never heard and is not aware that Huree Kishore did actually give the permission, but it is possible that Huree Kishore, knowing that this witness was opposed to his giving his son in adoption, did not think fit to tell him what he had done. That Huree Kishore was talking to this person about giving his son in adoption, and had the intention to do so, supports Huro Soonduree's evidence.

The previous witness for the plaintiff—Gobind Lall Gossamee—said that he was the nephew of Huree Kishore, and was present at his death; that he did not know whether before his death he gave the permission to Huro Soonduree to give his son to Horendro Narain Adhikaree; that he did not give the permission before him (the witness); and then he said:—"As he was my "uncle, had he given permission to give his "son for adoption, I should have certainly "known it." It is clear that Huree Kishore talked to the other person about it, and it does not follow from his not having talked to his nephew that he had not the intention, and did not give the permission. Therefore, upon both these questions,—the permission by Horendro to adopt, and the permission by Huree Kishore to his wife to give his son in adoption,—we think there is sufficient evidence on the part of the defendants to justify the conclusion to which the Subordinate Judge came.

Upon both grounds,—first, that the *suit for* a declaration of the invalidity of the *adoption* is barred by the law of limitation, *and* secondly, upon the facts,—we think that the decision of the Court below is right, and that the appeal ought to be dismissed with costs.

We omitted to notice that the plaintiff gave some evidence that money had been given to Huro Soonduree for giving the child to Bhoobun Moyee. We are not inclined to believe that evidence; but if any money passed, looking at the evidence of the permission to give her son in adoption, we think it does not support the case of the plaintiff, which is that Huro Soonduree, not having any permission from her husband, was induced by the giving of money to allow Bhoobun Moyee to have the child; that knowing that a valid adoption could not be made, she would not part with the child without receiving the money. Looking at that evidence in connection with the other evidence and the circumstances in the case, we do not think that it is worthy of credit.

The 7th December 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Interest—Bond—Fraudulent Contract.

Case No. 232 of 1873.

Regular Appeal from a decision passed by the 2nd Subordinate Judge of Mymensingh, dated the 21st July 1873.

Lall Beharee Awustee (Plaintiff) *Appellant,*

versus

Bholanath Dey Chakladar (Defendant) *Respondent.*

Digitized by Google

Baboos Mohinee Mohun Roy and *Nullit Chunder Sen* for Appellant.

Baboos Doorga Mohun Doss and *Boikantnath Doss* for Respondent.

In a suit brought upon two bonds for Rs 2,000 and Rs. 1,000, respectively, where the transaction was found to be that defendant's property having been about to be sold in execution of a decree for a sum much more than Rs. 3,000, he was made to appear to borrow from the plaintiff, at 75 per cent. interest, Rs. 3,000 which were immediately applied to the payment of the debt, the defendant deriving no other benefit, and the plaintiff not binding himself to stay execution:

HELD, that the contract in these bonds was of such a nature as to involve the conclusion that defendant was imposed upon and was not a free agent; and that the transaction was of a kind not to be supported by a Court of equity.

Couch, C.J.—THIS suit was brought upon two bonds, one for Rs. 2,000 and the other for Rs. 1,000; and it is said that as a security for the payment of the two sums, the defendant hypothecated the properties mentioned in the schedule to the plaint. The bonds were registered, and by the terms of them the Rs. 3,000 were to be repaid in the month of Choitro 1278, with interest at 6 per cent. per month up to the date of payment. The money was borrowed on the 1st of Magh 1275.

The Subordinate Judge who tried the case laid down for his determination the following points—1*st*, whether the bonds were freely given by the defendant or were taken from him by undue influence; 2*ndly*, whether the contract was legal; 3*rdly*, was there a legal tender of the money; and *lastly*, whether the plaintiff is entitled to get the money with interest. As to the principal sums of Rs. 2,000 and Rs. 1,000, he decreed that the plaintiff should recover them, but he gave him interest at the rate of 12 per cent. per annum only.

The plaintiff has appealed from this decree, contending that he is entitled to interest at the rate mentioned in the bonds, namely, 75 per cent. per annum.

The case of the defendant, as it appears upon the evidence, is that the plaintiff had execution proceedings against him, and that upon his property being lotted for sale he applied to the plaintiff for time; that the plaintiff consented to allow him time, but that, on the day before the 1st of Magh 1275, the day fixed for the sale, the plaintiff refused to allow him time, and, having threatened to cause the petition which the defendant had presented praying that the sale might be stayed to be rejected, induced or caused him to give the bonds. Money was given to the defendant; but, according to the evidence of the witnesses, was not kept by him but was handed back to the plaintiff, and as one of them says was applied towards the satisfaction of the decree for which the execution had been issued. The plaintiff said he was only partly interested in this decree, and that other persons were also interested and received their share of the money. Whether the Rs. 3,000 was lent by the plaintiff solely on his own account or was not lent on account of other persons also, not parties to the present suit, does not appear. It is possible that those persons may be interested in this suit.

The nature of the transaction, then, is that the defendant's property being about to be sold in execution of a decree for a considerable sum of money, much more than the Rs. 3,000, the defendant is made to appear to borrow from the plaintiff Rs. 3,000 which are immediately applied towards the payment of the debt for which the execution had issued, and the defendant, except by the reduction of that claim, received no benefit whatever. The plaintiff does not appear to have bound himself in any way not to proceed with the execution and to have the property sold. So far as any agreement was entered into by him, he might, immediately after the giving of the bonds by the defendant, have proceeded with the execution and had the property sold. It is possible that the Court would have restrained him from doing so, but that would have been upon grounds of equity, and not because he had made any express agreement.

The interest payable on the loan is at the rate of 75 per cent. per annum. But this is not all. The money was not to be repaid for three years, and the plaintiff has actually availed himself of this stipulation; for the defendant endeavoured to pay off the money at an earlier period and relieve himself of the obligation to pay interest at the rate of 75 per cent., but the plaintiff insisted that he was not bound to receive the money before the time fixed, *viz.*, Choitro 1278, and refused to take it. So that the defendant, getting only the slight benefit of the Rs. 3,000 being applied in reduction of the claim against him upon the decree, bound himself to repay the principal sum of Rs. 3,000 and interest at the rate of Rs. 225 per cent., and could not relieve himself from the payment of this interest by offering to pay it at an earlier period.

That is a transaction which we think no Court can give effect to. It may be that

Digitized by Google

there is no evidence of what might be called coercion by the plaintiff of the defendant. Nor is there evidence of any misrepresentation of fact, but the whole transaction appears to us to be of such a nature as to come within what is said by Lord Westbury in Tennent and Tennents* which I have quoted on a former occasion, where his Lordship said that there may be such a gross inadequacy of consideration as to involve the conclusion that the party either did not understand what he was about, or was the victim of some imposition. The contract in these bonds is of such a nature, when we look at the consideration for it, as to involve the conclusion that the defendant was imposed upon and that in executing these bonds he was not a free agent. A transaction of this kind is one which cannot be supported by a Court of equity, and we think that the decision of the Subordinate Judge is a right one, and that the appeal should be dismissed with costs.

The 7th December 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Act X of 1859 *s.* 78—*Decree—Execution.*

Case No. 181 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Beerbhoom, dated the 12*th May* 1874, *reversing a decision of the Moonsiff of Bolpore, dated the* 10*th January* 1874.

Pureshnath Ghose Mundul (Judgment-debtor) *Appellant,*

versus

Kristo Lall Dutt and another (Decree-holders) *Respondents.*

Baboo Lukhee Churn Bose for Appellant.

Baboo Kalee Prosunno Dutt for Respondents.

Where a Moonsiff gave, under Act X of 1859 s. 78, a decree for ejectment and for the recovery of a certain amount of rent, and the decree was not modified in review, it was held that the Lower Appellate Court was right in holding that inasmuch as the tenant did not deposit the money within 15 days from the date of the decree, execution should issue to recover possession of the property.

Markby, J.—It appears in this case that the Moonsiff originally gave, under Section 78 Act X of 1859, a decree for ejectment and for the recovery of a certain amount of rent, which decree was of course subject to the provisions of Section 78 in favor of the tenant that, if the amount decreed was paid within fifteen days from the date of the decree with costs and interest, execution should be stayed,—which of course means substantially that the decree is satisfied, and that part of it which relates to recovery of possession is cancelled, and the tenure saved. That was the decree given in this suit. That decree might have been modified by the Moonsiff in review, or might have been modified by the Appellate Court. In fact, the Moonsiff had attempted to modify this decree in review. But it is now finally held that the order of the Moonsiff granting the review was illegal, and it is finally declared that his proceedings in that respect were void. The original decree, therefore, as made by the Moonsiff stands, and that is the decree which is now to be carried out. It seems to us that the Lower Appellate Court was right in holding (subject to any other objections) that inasmuch as the tenant did not deposit the money within fifteen days from the date of that decree, execution should issue to recover possession of the property. The view taken by the Judge appears to us to be entirely in accordance with the decisions of this Court. In a case reported in the 18th Weekly Reporter, p. 412, at the foot note, the Chief Justice Sir Barnes Peacock observes that execution may be stayed under proper circumstances by the Appellate Court. But it is quite clear that what is there alluded to is the action of the Appellate Court when the appeal against the original decree is before it, and not the action of the Court when the decree comes to be executed by it. In the same case Mr. Justice Jackson says:—"The privilege "allowed to the defendant in cases of this "nature to stay execution of the decree on "payment of the amount due with costs and "interest, is not a matter within the discre-"tion of the Judge. That is clearly a pri-"vilege allowed to the defendant under the "decree." And Mr. Justice Phear in a case reported in the 21st Weekly Reporter, p. 11, gives a general exposition of this Section with which we entirely concur. The learned Judge says:—"In a case of this kind "the defendant was under an obligation by "the terms of the decree not only to pay "the money decreed to be paid to the "plaintiff, but also to give up possession of "the property to the plaintiff. But then the

* 2 L. R., Scotch Appeals, p. 6: quoted at p. 424, Vol. 21, W. R.

Digitized by Google

"Legislature by the provisions of Section 52, "Act VIII (B.C.) of 1869 (which is similar "to Section 78, Act X of 1859) gives a "defendant who is under a double obligation "of this kind, a certain amount of relief; "for that Section declares that if he pays "the amount of money decreed within fifteen "days from the date of the decree, then h· "shall be relieved from the operation of the "other portion of the decree. In this case, "then, the defendant might have avoided "the cancelment of his lease which was "directed by the decree, if he had paid the "money decreed to be paid within fifteen "days from the 12th August,—that is to say, "at any time on or before the 27th August. "He did not attempt to pay, as I understand "the facts, until the 19th September. Con- "sequently, he has not done anything to "entitle himself to the relief which is afforded "by Section 52 of the Rent Law." That being the right interpretation of this Section, the Lower Appellate Court was clearly right in saying that the fifteen days should be reckoned from the date of the only decree which was given in this case,—namely, the original decree of the Moonsiff.

The result is that the Judge's order of remand is right, and this special appeal will be dismissed with costs.

The 8th December 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Act VIII of 1859 *s.* 355—*Additional Evidence—Special Appeal.*

Appeal under Section 15 *of the Letters Patent against the decision of the Hon'ble F. B. Kemp, one of the Judges of the High Court, dated the* 23*rd July* 1874, *in Special Appeal No.* 2534 *of* 1873.*

Mahomed Kamil (Plaintiff) *Appellant*, *versus*

Abdool Luteef (Defendant) *Respondent*.

Baboo Rama Churn Banerjee for Appellant.

Moonshee Serajul Islam for Respondent.

A case in which the Subordinate Judge, in appeal, took evidence under Act VIII of 1859 s. 355, having come up to the High Court in special appeal, it was held that the fact of the Lower Appellate Court taking additional evidence did not make the special appeal liable to be heard and determined as if it were a regular appeal.

* *Ante*, p. 369.

Couch, C.J.—In this case the title of the plaintiff depended upon a purchase by him, and what was purchased is described in the kobalah. We must take that as showing what he purchased and acquired a title to, assuming that the person selling to him had a right to dispose of it.

The kobalah it is true contains the words referred to by the learned Judge, but it also refers to a description of the property intended to be conveyed by boundaries in the schedule, which is the same as if the boundaries were in the body of the instrument. It then become a question of fact whether the land which the plaintiff sued for was within those boundaries or not; and it was for the Lower Courts, who had to try the questions of fact, to determine that.

The Moonsiff decided against the plaintiff, but he seems not to have had his attention directed to the reference to the boundaries.

The Subordinate Judge having taken, as he had power to do, evidence under Section 355 of Act VIII of 1859, reversed the Moonsiff's decision and decreed in the plaintiff's favor upon this question whether the land in suit come within the description of the land which the plaintiff had bought. He appears to have satisfied himself, whether rightly or wrongly it is not for us now to determine, that the plaintiff did buy this land.

In the special appeal our learned colleague appears to have thought that as fresh evidence had been taken by the Subordinate Judge, the case might be heard as if it were a regular appeal, and the learned Judge considered whether the new evidence was worthy of credit, and came to the conclusion that it was not, and disbelieved it.

We are not aware that there was any authority that the fact of the Lower Appellate Court taking additional evidence made the special appeal liable to be heard and decided as if it were a regular appeal. It does not appear to us that this is the effect of the Lower Appellate Court taking additional evidence, and so far we cannot agree with the learned Judge.

Then, as we have said, it was a question of fact whether this land came within the description of the plaintiff's kobalah, and it was also a question of fact what was proved by the chittahs. The whole question appears to us to have been one which it was not open to the learned Judge to decide in the special

Digitized by Google

appeal. Whether the Subordinate Judge's decision is right or not, we will not pretend to give an opinion upon or to consider it, because we ought not to consider that in this special appeal. We do not see any thing in his judgment which can be said to be an error in law for which a special appeal would lie. Therefore, we think the decision of the learned Judge should be reversed, and instead of the plaintiff's suit being dismissed, the special appeal should be dismissed with costs, including the costs of this hearing.

The 9th December 1874.

Present:

The Hon'ble W. Markby, *Judge.*

Limitation—Act IX of 1871 *s.* 27—*User "as of Right."*

Case No. 992 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 24th January 1874, *reversing a decision of the Additional Moonsiff of that district, dated the* 30*th August* 1873.

Alimooddeen (one of the Plaintiffs) *Appellant,*

versus

Wuzeer Ali and others (Defendants) *Respondents.*

Baboo Gopeenath Mookerjee for Appellant.

Baboo Aukhil Chunder Sen for Respondents.

The enjoyment described in Act IX of 1871 s. 27 by the words "as of right" does not mean user without trespass, but it means user in the assertion of a right.

In this case the plaintiffs sued to recover immediate possession of a very small strip of land lying between land which is undisputedly their own on the one side, and land which is undisputedly the land of the defendants on the other. In other words, this is a boundary dispute. Substantially the questions raised in the first Court were first whether the plaintiff's claim was barred by limitation: secondly, to what daghs and surplus of daghs this land belongs; and, thirdly, if the land belongs to daghs or surplus of daghs of the plaintiff, has there been a road-way so as to bar that portion of the claim which seeks to have the road closed. I should have mentioned that the claim of the plaintiff was also to have the road closed. Now the Moonsiff having raised these questions did not come to any express finding upon the plea of limitation. He found in accordance with the Ameen's report that this land was the surplus land of the plaintiff's dagh No. 1971. He also found that although people had been in the habit from time to time of passing over the land, nevertheless that the maliks of dagh 1971, that is, the plaintiffs, had not only remonstrated, but for short periods had closed up the passage. Now it appears to me that the Moonsiff has given very good reasons for coming to that conclusion. Of course, whether or no that was a right conclusion it is not for me to say. All that I say is that the reasons given by the Moonsiff are quite sufficient for coming to the conclusion to which he did. I think he was also justified in this case in not more expressly determining the issue of limitation. This strip of land is a very narrow one, and it is pretty obvious that it was turned to no particular purpose. Therefore it was almost impossible to prove any acts of ownership on either side other than those which in fact the plaintiff had proved to the satisfaction of the Moonsiff, namely, that he had as owner repeatedly interrupted the use of this piece of land for the purpose of a road. I think that the judgment of the Moonsiff, subject to one observation which I shall make presently, was in point of law a right judgment. Then the Subordinate Judge in trying this appeal has committed an error, which, I think, is fatal to his judgment. He says that the plaintiff did not claim this land as surplus land. The plaint has been read, and it is clear that he does claim this land in the plaint as surplus land, using the very word which the Subordinate Judge himself used, and the issue also shows that that was the way in which the case was presented to the first Court. The question raised by the issue is whether this land belongs to two daghs of the plaintiff or to surplus land of those two dagh. Without therefore adverting to any other ground of appeal, I think that the judgment of the Subordinate Judge cannot stand. The case must therefore be remanded for a fresh trial of the appeal.

It is I think desirable to point out how this case should be disposed of. The first question will be—as put by the Moonsiff—to what dagh this land belongs. If it is found that it does not belong to either of the two daghs of the plaintiff or to the surplus land of those daghs; in other words, if the Subordinate Judge feels himself justified in reversing the finding of the Moonsiff on that point, of course the suit must be dismissed. But, on the other hand, if he finds that the

Digitized by Google

land in dispute does belong to either of those two daghs, or to the surplus land of those daghs belonging to the plaintiff, then the plaintiff is entitled to a decree in some shape, whether there was a right of way over this land or not, because in that case the plaintiff is the owner of this land subject to a right of way, and subject to that right he will be entitled to possession of it. If therefore the first question is determined in favor of the plaintiff, it will then be necessary to determine whether or not that right of way exists; and whether it is a right of way of the public or a right of way of the defendants only, for it is not quite clear what the finding of the Subordinate Judge is upon that point.

I think I also ought to point out that, in determining that question, the Moonsiff, as it appears to me, has fallen somewhat into an error in the statement of the law. He says in the passage I have already referred to that "the maliks of dagh No. 1971 had "not only remonstrated, but for short periods "had closed up the passage; consequently "there has been neither uninterrupted user "nor has that user been as of right." Now in my opinion the question whether the user has been as of right under the Act of 1871 does not depend upon whether there has been interruption or not. The Moonsiff seems to think that the words "as of right" in Section 27 of that Act, mean user without trespass. I think those words do not mean that, and that they mean user in the assertion of a right. There is ground, no doubt, for the Moonsiff's opinion in the view that has been taken of the same words under the English Prescription Act, but after much consideration I think that the words in the Indian Act mean what I have above stated. If the observations of Lord Wensleydale in the judgment in Bright *v.* Walker, 1 Cr. M. and R., page 219, be compared with the observations of the same learned Judge in Flight *v.* Thomas, 11 Ad and E, page 693, it will be seen what were the difficulties which arose upon that interpretation of those words in the English Act. I think we ought to do our utmost to prevent the introduction of those difficulties here. And giving to the words "as of right" what I consider to be their true meaning, and also their accustomed meaning (for they are a well known legal expression) I think they signify no more than (as I have said) that the enjoyment must be by a person in the assertion of a right.

The Moonsiff's finding also is not sufficient on the question of interruption. What amounts to an interruption is explained in the Act, namely, that "nothing is an interruption "within the meaning of this Section unless "where there is an actual discontinuance of "the possession or enjoyment by reason of "an obstruction by the act of some person "other than the claimant, and unless such "obstruction is submitted to or acquiesced in "for one year after the claimant has notice "thereof and of the person making or "authorizing the same to be made." An interruption for a short period will not suffice. The only other qualification for the enjoyment is that it must be peaceable and open. If it is found that the enjoyment in this case has not been peaceable, then the defendants cannot have the benefit of the statute. That therefore will be the question to be considered in deciding whether or no the easement has been acquired; for there is no doubt the enjoyment was open: in my opinion it was an enjoyment as of right, and it has not been found to have been interrupted in the sense in which the Act has defined an "interruption."

The appeal must be remanded to the Subordinate Judge for retrial. Costs to abide the result.

The 9th December 1874.

Present:

The Hon'ble W. Markby, *Judge.*

Rent—Suit by Co-sharer.

Case No. 1243 of 1874.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 19th September 1873, *reversing a decision of the Moonsiff of Ghattal, dated the 30th June* 1873.

Dinobundoo Roy (Plaintiff) *Appellant,*

versus

Ooma Churn Chowdhry and another (Defendants) *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Kalee Mohun Doss for Respondents.

Where a tenant, knowing that a co-proprietor has been in possession of a share for a very long time, and after distinct notice, paid rent which belonged to the said sharer to another person who had no title at all, it was held that a suit by that single proprietor for his share of the rent was maintainable.

It seems to me that the judgment of the District Judge in this case cannot be sup-

Digitized by Google

ported. The first Court found that the plaintiff had been in the possession of the share which he claimed for a very long time; and that the tenant knowing this, had paid the rent of the plaintiff's share to another person. Unless these facts are displaced, I think it is impossible to avoid saying that this case is governed by the Full Bench decision reported in the 21st Weekly Reporter, page 46. That decision, no doubt, goes no further than saying that that particular suit was maintainable. But it seems to me impossible to say that the suit was maintainable in that case, and not in this upon the facts as found by the Moonsiff. In that case Mr. Justice Jackson, who expressed his opinion more fully than the other learned Judges, says:—"There is a class of suits somewhat "resembling the present, in which I have, on "several occassions, expressed an opinion "that the plaintiff is not entitled to sue "separately, that is to say, where several "persons being jointly entitled to receive "rent from a ryot, and having been accus-"tomed to receive such rent jointly, after-"wards one or more of them brought separate "suits against such ryot in respect of their "separate shares. In those cases it was "held that the nature of the contract or "holding being such that the ryot was "accustomed to pay his rent in one sum to "the joint agent of the owners, he ought not "to be harassed by being sued in several "suits in respect of portions of the same "claim." Mr. Justice Jackson, therefore, guards himself against laying down the proposition that a single proprietor may sue in all cases for his share of the rent, and as at present advised I concur in that reservation. But, as the learned Judge then points out, the case then before the Court, and also as it appears to me this case, are different from that, because as I have said according to the finding of the Moonsiff the tenant here, after having a distinct notice, had paid rent which belonged to the plaintiff to a person who had no title at all. Therefore, reserving, as Mr. Justice Jackson did in that case, my opinion upon the general question, I still think that this suit upon the facts as found by the Moonsiff is maintainable. The Lower Appellate Court has not displaced those facts, and therefore I think it was wrong in dismissing the suit. The decision of the Lower Appellate Court as it at present stands is erroneous in law and must be set aside, and the appeal remanded to be reheard. Costs will abide the result.

In Special Appeals Nos. 1241, 1242, and 1244 of 1874, it appears that the Judge has proceeded upon the same ground. Therefore, for the same reasons, the judgments of the Lower Appellate Court in these cases must also be set aside, and the appeals remanded to be reheard. Costs in all these cases will abide the ultimate result.

The 10th December 1874.

Present:

The Hon'ble W. Markby, *Judge.*

Issues—Jurisdiction.

Case No. 395 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 17th November 1873, *reversing a decision of the Moonsiff of Manickgunge, dated the 28th April* 1873.

Sitanath Doss Chowdhry and others (Defendants) *Appellants,*

versus

Doyadronath Doss Chowdhry and others (Plaintiffs) *Respondents.*

Mr. M. M. Ghose and *Baboo Doorga Mohun Doss* for Appellants.

Baboo Umbica Churn Bose for Respondents.

A Court is not under any obligation as to the order in which it is to try the issues which are raised before it, but may dispose of them in the way which it considers most likely to conduce to the ascertainment of the truth.

THIS was a suit to recover possession of certain land. The Moonsiff, after a careful consideration of the evidence, came to the conclusion that the plaintiff had not proved his possession within twelve years, and on that ground, without going into the question

Digitized by Google

of title, dismissed the suit. The plaintiff appealed, and the Lower Appellate Court having heard the appeal dealt with it in this way. The Subordinate Judge first inquired into the question of title, and for the reasons which he stated, and which I shall refer to again presently, came to the conclusion that the document upon which the defendant's title was based was a forgery. Then having come to that conclusion, it was still necessary for him, and he went on, to try the question of limitation. Differing from the Moonsiff, he disbelieves the evidence of the defendant and believes that of the plaintiff, and so finds that the plaintiff had been in possession within twelve years. As I have pointed out during the argument, the only possible objection that can be taken to the judgment of the Subordinate Judge in this case is, that when he comes to deal with the question of possession he takes into his consideration the result which he had arrived at upon the question of title. There can be no doubt, I think, upon his judgment that finding that the defendant had produced what the Subordinate Judge considered to be a forged title, he, upon that ground, looked upon his case as to possession with very great suspicion. Now it has been contended by the appellant that that was in effect to deprive the defendant of the benefit of the statute of limitation; because in that way a defendant might always be called upon to prove his title, and then failing to prove his title, his evidence as to possession might also be discredited. If the effect of the Subordinate Judge's judgment was really to deprive the defendant of the benefit of the statute, I should no doubt be bound to set it aside. But upon consideration I do not think that I can fairly say that that is the result of that judgment. I think it cannot be denied that no one can impose upon any Court as a matter of law any obligation as to the order in which it is to try the issues raised before it. It may well be that the Court may desire to look into the whole evidence before coming to a finding upon any one issue, and finding that the party has made a clearly false case upon one issue may express that opinion, and then approach the other issues which it is necessary to try. I think every Court has an absolute right to dispose of issues in the way which it considers most likely to conduce to the ascertainment of the truth. Therefore the judgment of the Subordinate Judge cannot be impeached in special appeal merely upon the ground that the question of title was tried first.

Then as to the mode in which the Subordinate Judge has tried the question of title. He says the question of title is this. He says that "although the document is dated at a "time when stamps were not in force, yet this "document bears a stamp." He also says that "the document describes the property by a "number, but I have ascertained by taking "evidence that at that time no such number "existed." Then he goes on to say that "finding these two things I can come to no "other conclusion than this that this is a "forged document." Now there is no allegation that the defendants were taken by surprise by the mode in which the Subordinate Judge has dealt with the case, or that they had not full opportunity of explaining these apparent peculiarities which appear on the face of the document of their title. I think I should not be justified in saying as a matter of law that the Subordinate Judge was not entitled to come to the conclusion that he did, namely, that without any explanation this document could not be a genuine document, and that it must be a document forged by the defendants. It is not a case in which the defendants have been called upon to prove their title, but they have produced a document which upon the face of it the Lower Appellate Court thinks must be a forged document. It has given reasons for thinking so; those reasons have not been met by the defendants; and I cannot say that the Court was wrong in law in coming to that conclusion. Having come to the conclusion that the defendants have put forward a forged document, the Subordinate Judge was quite justified in taking that into his consideration as an incident in the case when he came to deal with the question of possession. It certainly must throw discredit upon the whole case of any party when, in any one part of it, he is proved to have resorted to the use of a forged instrument. Whether or no the Subordinate Judge has come to a right conclusion on the question of fact, and whether or no also he has tried this case exactly in the way in which I should have tried it, is a totally different matter. I have no power to interfere with his judgment, unless I see that he has committed an error in law; and I am not prepared to say that there is any error in law committed by the Subordinate Judge in deciding this case, which renders his judgment impeachable in special appeal.

The appeal must be dismissed with costs.

Digitized by Google

The 18th December 1874.

Present :

The Hon'ble W. Ainslie, *Judge.*

Mortgagor—Mortgagee—Fraud—Onus Probandi.

Case No. 685 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 22nd December 1873, *affirming a decision of the Moonsiff of Manickgunge, dated the 19th May* 1873.

Asgur Beparee and another (Defendants) *Appellants,*

versus

Hurree Mohun Mozoomdar (Plaintiff) *Respondent.*

Baboo Doorga Mohun Dass for Appellants.

Baboo Nullit Chunder Sen for Respondent.

In a suit for possession where plaintiff sets up a late purchase against a defendant whose title is derived from a sale in execution of a decree which was made on a mortgage-bond, and alleges that the earlier transaction was fraudulent, the onus is on the plaintiff to start his case by showing certain facts from which the Court ought to infer collusion between the mortgagee and mortgagor.

THE judgment of the Lower Appellate Court must be reversed. That Court does not appear to have considered what was the position of the parties. The defendant is a person who derives title under what is admittedly the earliest transaction affecting the property, and that is a mortgage-bond of the 23rd of Magh 1273, which was followed by a decree in 1869 and a sale in execution at the end of the year, by which he acquired title. The plaintiff claims under a title of later date,—namely, the 4th of Aghran 1274. He comes into Court to obtain possession as against the defendant by setting up his later purchase against the earlier mortgage and the decree and sale following thereon, and he alleges that this earlier mortgage was a fraudulent transaction.

It seems to me that the proceedings of a Court must be presumed to be correct. We are not to suppose that a fraud was practised on the Court, and that the decree and sale were the results of that fraud. The onus is on the plaintiff to start his case by showing certain facts from which the Court ought to infer that the holder of the mortgage-bond was acting in collusion with the mortgagor in order to misrepresent the date of the bond, or, in other words, that the bond although signed by Hurree Mohun Roy is in fact a forgery, inasmuch as it has been ante-dated.

The Subordinate Judge has, in a very elaborate judgment, considered whether the plaintiff really purchased from Hurree Mohun Roy, and he has come to the conclusion that he did so. Admissions which he may have made can be used against him, but such admissions as are of date subsequent to the date of the mortgage-bond are no evidence against the mortgagee. There does not appear to me to be in the judgment of the Subordinate Judge any finding whatever either that this bond is a forgery perfected at some date subsequent to the 23rd of Magh 1273, or that subsequent to that date Asgur Beparee joined Hurree Mohun Roy in a transaction which was simply colorable. None of the witnesses to the bond have been examined, and no evidence whatever seems to have been recorded except such as bears upon the subsequent conduct of Hurree Roy.

Under these circumstances, it appears to me that the plaintiff has not started any case at all, and although the Subordinate Judge says that there is no proof of the *bona fides* of the mortgage set up by the defendant, that really cannot affect the result of the present suit ; and even that finding is qualified by the passage which immediately follows it :—"It is not my purpose to state "whether the defendant has or not a remedy "still left to him to proceed *de novo* to "establish his claim in the presence of this "plaintiff." But that is the whole question in the case. The point to be determined in this case was whether, as between the parties, this mortgage-bond was effectual against the plaintiff or not. If he has not done that, he has not determined any thing in the suit, but there can be no remand in-

Digitized by Google

asmuch, as already stated, the plaintiff has never started his case. The decree of the Lower Appellate Court must be reversed, and suit of the plaintiff in so far as it relates to the 1 anna 1 gundah 2 kurras and 2 krantees share, the subject of this appeal, be dismissed with costs.

In respect of the remaining 5 gundahs share, it seems to me that there never was any contention between the parties, and therefore it is unnecessary to disturb the decree of the Lower Courts in so far as it declares the right of the plaintiff to that share; but I think no costs ought to be allowed in respect of that.

The 18th December 1874.

Present:

The Hon'ble W Ainslie, *Judge.*

Default—Act VIII of 1859 *s.* 348.

Case No. 881 of 1874.

Special Appeal from a decision passed by the Additional Subordinate Judge of the 24-*Pergunnahs, dated the* 17*th January* 1874, *affirming a decision of the Moonsiff of Alipore, dated the* 10*th June* 1873.

Buroda Kant Bhuttacharjee and others (Defendants) *Appellants,*

versus

Pearee Mohun Mookerjee (Plaintiff) *Respondent.*

Baboo Opendro Chunder Bose for Appellants.

Baboo Bhowanee Churn Dutt for Respondent.

Where an appeal is dismissed for default, the hearing of objections under Act VIII of 1859 s. 348 cannot be allowed to proceed.

The decree of the Judge must be set aside, and the case returned to him for retrial. When the original appeal was dismissed for default, the hearing of the objections under Section 348 of Act VIII of 1859 could not proceed.

If the party who made those objections wished for a hearing, he ought not to have taken advantage of the default of the other party. The Judge will restore the case to his file, and hear the appeal and the objection together. Costs will follow the result.

The 22nd December 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Decree (Original or Appellate)—Execution.

Case No. 210 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Mymensingh, dated the 16*th April* 1864, *affirming an order of the Moonsiff of Niklee, dated the* 30*th December* 1872.

Bistoo Pershad Chuckerbutty (Decree-holder) *Appellant,*

versus

Ishan Chunder Roy (Judgment-debtor) *Respondent.*

Baboo Kashee Kant Sen for Appellant.

Baboo Nullit Chunder Sen for Respondent.

Where in a review or appeal proceeding a decree is passed in affirmance of the decree appealed against, the decree of the appellate or reviewing Court is the final decree between the parties and therefore the decree to be executed. Two Full Bench decisions on this point explained.

Phear, J.—The judgment-creditor in this case obtained a decree against the judgment-debtor in the Lower Court on the 19th March 1869. Against this decree the judgment-debtor appealed to the High Court, and the High Court dismissed the appeal on the 16th August 1869. By dismissing the appeal, it virtually affirmed the decree of the Lower Court, and the final decree between the parties, although it was expressed by the decree of the Lower Court, which was passed on the 19th March 1869, was thus dated the 16th August 1869; and from that date until the date of the present application for execution, three years had not elapsed. The Lower Court is, therefore, in our opinion, in error in holding that the present application is barred.

There seems to have been in the minds of the parties some misapprehension of the effect of certain Full Bench decisions of this Court, namely, those which are reported in VII Weekly Reporter, p. 521, and in XVI Weekly Reporter, p. 1, Full Bench Rulings. In the judgments which were delivered in these two cases, it is pointed out that there may be three different states of fact in reference to a matter of the kind which is now before us. First, the judgment-creditor

Digitized by Google

may appeal or present an application for review; and this appeal or application for review may be disposed of without the other side being called upon to meet it. In such a case, the act of the judgment-debtor has failed to alter the decree which was passed against him and does not and cannot count in favor of the judgment-creditor in respect of the time. If, however, an application of this sort is opposed by the judgment-creditor, and the result of the opposition is that the appeal or review fails without any final decree in the appealing or reviewing Court, then the step which was taken by the judgment-creditor is reckoned as a step taken by him for the purpose of keeping his original decree alive. In both these instances, the final decree between the parties is the decree which was appealed against or sought to be reviewed. And the reckoning of the time for execution varies according as the judgment-creditor has taken any step in the matter or not.

The third case is where in a review or appeal proceeding a decree is passed in affirmance of the decree appealed against. And in that case (as was held in the Full Bench decisions) the last decree, *i.e.*, that of the appeal or reviewing Court, is the final decree between the parties, and is therefore the decree which falls to be executed.

We think that the judgment of the Lower Court must be reversed, and execution must issue upon the application of the judgment-creditor. He must have his costs in all the Courts.

We assess pleader's fees at one gold mohur.

The 22nd December 1874.

Present:

The Hon'ble W. Ainslie, *Judge.*

Presumption—Act X of 1859 s. 4.

Case No. 679 of 1874.

Special Appeal from a decision passed by the Judge of 24-Pergunnahs, dated the 31st December 1873, affirming a decision of the 2nd Moonsiff of Diamond Harbour, dated the 31st January 1873.

Pearee Mohun Mookerjee (Plaintiff) *Appellant,*

versus

Koylas Chunder Byragee and others (Defendants) *Respondents.*

Baboo Aushootosh Mookerjee for Appellant.

Baboo Doorga Ram Bose for Respondents.

In a suit for enhanced rent, where defendant pleads the presumption arising under Act X of 1859 s. 4, the fact that he holds a pottah of a date subsequent to the permanent settlement, but granted in confirmation of a prior holding, does not rebut the presumption.

THE defendant alleged that he had held the land from the year 1190 at a rent of sicca Rs. 6-12, which was converted in 1245 into Company's Rs. 7-3-5 and claimed exemption from payment of enhanced rent on the presumption arising under Section 4 of Act X of 1859, on proof of payment of an uniform rate of rent for the last thirty years. The pleader for the respondent in this case laid stress on the words used by Sir Barnes Peacock in the case reported in VI Weekly Reporter, page 57, Act X Rulings:—"So if he (the defendant) were to "say 'I have held for a period of 20 years at "the same rent; I hold a pottah of a date "subsequent to the permanent settlement, but "that pottah was granted to me in confirmation "of a prior holding;' that would not rebut "the presumption arising from the proof of "his having held at a rent which has not been "changed for a period of twenty years next "before the commencement of the suit." These words occur in the judgment of a Full Bench: and although a decision has been pointed out which seems to be in conflict with them, the Court is bound by the Full Bench judgment; and that the Courts below were right.

The special appeal is dismissed with costs

The 22nd December 1874.

Present:

The Hon'ble W. Ainslie, *Judge.*

Plaintiff's Failure to produce Evidence—Act VIII of 1859 s. 114.

Case No. 690 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of 24-Pergunnahs, dated the 29th December 1873, affirming a decision of the Moonsiff of Sathkhira, dated the 24th March 1873.

Mofizooddeen and others (some of the Defendants) *Appellants,*

versus

Shaikh Amooddeen and others (Plaintiffs) *Respondents.*

Digitized by Google

Baboo Doorga Mohun Dass for Appellants.

Baboo Nil Madhub Bose for Respondents.

A plaintiff's neglect to produce evidence on the day fixed for hearing, precludes him from bringing a fresh suit with respect to the same cause of action, just as his default would under Act VIII of 1859 s. 114.

I THINK that the judgment of both the Courts below is wrong, and that the former decree of the 25th February 1872 is a bar to the present suit. It is admitted that the parties are the same, the cause of action is the same, and though it is not distinctly admitted on the other side that the subject-matter is the same, yet it is a mere suggestion that it may be somewhat different.

In the suit in which that decree was made the defendants were summoned and brought into Court. Both parties appeared by their pleaders; a day was fixed for hearing; and on the day fixed for hearing, the plaintiff, although he was present or represented in the suit, took no steps whatever to proceed with it. There was no evidence to support his case, and the suit was accordingly dismissed, and it must be assumed that the burden of proof was properly upon him. It seems to me that if the absence of a plaintiff from Court at the time appointed for the hearing of his suit may lead to a decree which, under Section 114 of Act VIII of 1859, concludes him from bringing a fresh suit with respect to the same cause of action, his neglecting to produce evidence on the day fixed for hearing must equally be held to preclude him. He put the other party to the trouble of collecting evidence and bringing it into Court, and there seems to be no reason why he should be treated more leniently than a plaintiff who fails to appear at the hearing of his case.

The case does not come within Section 110. It was not treated as under Section 97, and I am not aware of any other Section in the Civil Procedure Code by which a suit once commenced can be terminated in such a manner as to allow its being recommenced, subject of course to limitation.

I must hold that the Court which made the decree of 1872 heard all that was laid before it by either party, determined the suit on the materials then before it, and made such a decree as is an estoppel under Section 2 of Act VIII of 1859.

The decrees of the Lower Courts must be reversed, and the suit dismissed with all costs.

The 22nd December 1874.

Present:

The Hon'ble W. Ainslie, *Judge.*

Tenancy—Right of Occupancy.

Case No. 838 of 1874.

Special Appeal from a decision passed by the 1st Subordinate Judge of Hooghly, dated the 12th January 1874, modifying a decision of the Moonsiff of Oolooberiah, dated the 28th July 1873.

Anund Chunder Mudduck (Plaintiff) *Appellant,*

versus

Rash Beharee Dey (Defendant) *Respondent.*

Baboo Tarucknath Dutt for Appellant.

Baboo Sham Lall Mitter for Respondent.

A tenant in possession who derives his right from the zemindar, cannot be ousted by a prior tenant, unless the latter can show that the zemindar was not in a position to give the former leave to occupy the land and that he himself had a right of some superior nature which controlled the zemindar's power.

BOTH parties in this suit derive their title from the same landlord. The defendant was the original tenant of these lands. He got himself imprisoned for a long term of sixteen years. During his confinement his wife died, leaving two minor children. Either from misfortune or neglect he made no arrangement for the management of the property he had outside the jail, and the direct result was that the holding which is the subject of this suit remained unoccupied. In this state of things, the plaintiff went to the zemindar and obtained from him leave to enter upon the lands, and accordingly held them for a period of twelve years before he was ousted by the defendant. It is alleged, and it may be true, that the plaintiff deceived the zemindar, and induced him to accept him as a tenant by information which was not true. Whether that would give the zemindar any right against the plaintiff is a matter with which we have nothing to do. It is quite clear that whether he deceived the zemindar or whether he did not deceive him, he cannot be said to have committed fraud against the defendant. He has in support of his case put forward a document purporting to convey

Digitized by Google

property from the defendant to himself, which the Lower Appellate Court holds to be a forgery. But, because he has attempted to strengthen his position as a tenant with the license of the zemindar by alleging the license of the defendant also, it does not follow that the suit ought to be dismissed. He has got a right from a person who is capable of giving him leave to occupy the lands. That person has come forward to give evidence, and has apparently not withdrawn his leave. It, therefore, becomes necessary for the defendant to show that the zemindar was not in a position to give that leave; that he himself had such a right either of occupancy or of some superior nature, that the zemindar's power to give the lands to the plaintiff was controlled. He has done nothing of the kind; and even if he had attempted to do so, it seems to me that it would have been almost impossible for him to get over the fact that his right as well as his remedy had become destroyed by the plaintiff's possession of the land for upwards of twelve years whether through his misfortune or neglect.

The judgment of the Lower Appellate Court must be reversed, and that of the first Court restored. The appellant will get his costs in this and the Lower Appellate Court.

The 22nd December 1874.

Present:

The Hon'ble W. Ainslie, *Judge.*

Possessory Suit—Onus Probandi.

Case No. 909 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Jessore, dated the 26th January 1874, affirming a decision of the Sudder Moonsiff of that district, dated the 12th May 1873.

Juggut Chunder Chowdhry (Defendant) *Appellant,*

versus

Issur Chunder Fotadar (Plaintiff) *Respondent.*

Baboo Grija Sunkur Mojoomdar for Appellant.

Baboo Mohendro Lall Mitter for Respondent.

Plaintiff claimed certain land as the lakheraj of one S, purchased by him some years previously, and defendant alleged that it was originally the lakheraj land of B, from whom A, the father of S, held it as jummai, and that he (defendant) purchased it from B's heirs, continued A in his holding, and subsequently sued A for arrears of rent, sold the tenure in execution, and bought it himself. The Lower Appellate Court was of opinion that even if plaintiff's purchase was made on a wrong declaration as to the nature of S's right, still as it was admitted that S had held the land under some sort of legal right, plaintiff was entitled to possession under that right:

HELD, that this opinion was bad in law, and that plaintiff having failed to prove his case was not entitled to a decree.

THE plaintiff in this suit came into Court claiming certain lands, partly as ancestral lakheraj and partly as the lakheraj of Sreenath, purchased by him some years since. This appeal only concerns the land which is said to have been the lakheraj of Sreenath.

The defendant alleges that this was originally the lakheraj land of Boikunt Nath Bhuttacharjee; that Abhim Chunder, the father of Sreenath, held it as jummai land; that he, the defendant, purchased it from the heirs of Boikunt Nath and continued Abhim Chunder in his holding; and that eventually he sued Abhim Chunder for arrears of rent, and sold the tenure in execution of decree, purchasing it himself.

The Subordinate Judge has found that it is not proved that this land was ever the *jummai* land of Sreenath held under those who had a lakheraj title derived from Boikunt Nath Bhuttacharjee; but he has gone on to find whether this land is in fact the lakheraj property of Sreenath. He says:—"Even allowing for the sake of argument that at the sale at which the plaintiff purchased the land, a wrong declaration was made with regard to the nature of the right which Sreenath had in it, still when it is admitted that Sreenath held the property under some sort of legal right, I am clearly of opinion that the plaintiff in virtue of his purchase is entitled to possession under that right."

It appears to me that this part of the judgment is bad in law. The plaintiff came into Court alleging that this was the lakheraj land of Sreenath, and seeking to establish his full ownership in respect of it. If he failed in that, it does not at all follow from his having proved that Sreenath was a tenant under some one

Digitized by Google

else, that he would be entitled to a decree in the suit. The Subordinate Judge further goes on to say :—"Be that as it may, I do not "think that Sreenath held this land on a "*jummai* tenure, and not as his lakheraj "property. It is admitted on the part of "the appellant that this land is lakheraj; "and it is shown by a taidad filed by the "plaintiff that Gour Mohun Poddar, the "admitted common ancestor of the plaintiff and "of Sreenath, had a lakheraj and in mouzah "Bogchur. Under such circumstances the "natural presumption is that Sreenath who "had his house on the land now under con-"sideration held it as his lakheraj property." Now in the first place he is wrong in treating the statement of the appellant that this land is lakheraj as an admission. No doubt, the appellant before him said that this land was lakheraj; but he distinctly denied that it was the lakheraj of Sreenath. He positively asserted that it is not the lakheraj of Sreenath and that so far as Sreenath is concerned he never had any thing more than a ryotee interest.

Then there remain these two facts that a certain taidad has been filed by the plaintiff which shows that one Gour Mohun Poddar had, in mouzah Bogchur, some lakheraj land in no way identified; and that Sreenath had his house on the land now in suit. From these two facts and from the *admission* of the appellant (which is a positive denial) he infers that Sreenath held this land as his lakheraj property—an inference which the respondent here has not undertaken to support. It does not at all follow that because this land is not the lakheraj of Boikunt Nath, that therefore it is the lakheraj of Sreenath. It does not follow that it is lakheraj at all. Certainly the statement of the defendant that it is the lakheraj of Boikunt Nath cannot be strained in such a way as to make it an admission in favor of the plaintiff that at any rate it is the lakheraj property of some body. It seems that there is some evidence (upon the value of which this Court is not in a position to express an opinion) on the point whether this land is the lakheraj of Sreenath or not. The case must go back to the Subordinate Judge that he may find on the evidence of the plaintiff on the record whether he has sufficiently proved, not only that there was in the village some lakheraj land belonging to his ancestor Sreenath, but that it is the identical land which is the subject of this suit.

The costs will follow the result.

The 1st September 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Non-agricultural Holdings—Landlord and Tenant—Rent.

Case No. 1091 of 1874.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 11th February 1874, *reversing a decision of the Additional Moonsiff of Serampore, dated the 8th November* 1873.

Ranee Lalunmonee and another (Defendants) *Appellants,*

versus

Rajah Ajoodhya Ram Khan (Plaintiff) *Respondent.*

Baboo Bhowanee Churn Dutt for Appellants.

Baboos Kalee Mohun Dass and *Bydonath Dutt* for Respondent.

Except in the case of agricultural holdings, landlords and tenants cannot be compelled to enter into a contract against their inclination, nor can a tenant who holds at an inadequate rent, and who has no right to hold at a fixed rate, be compelled by proceedings in the Civil Court to pay a higher rate of rent.

Jackson, J.—THE land occupied by the defendant in this case is not an agricultural holding. This is shown by the circumstance that the Moonsiff tried the case not as a rent suit but as an ordinary civil suit, and the Moonsiff's procedure in that respect appears to have met with the Judge's approval. Notwithstanding that, the Judge appears to consider himself authorized to enquire into the nature and condition of the land; that the defendant holds, and of the holdings of persons who occupy surrounding lands and finding that the neighbouring occupiers paid considerably higher rent than the defendant paid, he has arrived by estimation at what he thinks a fair and equitable rate, *viz.*, Rs. 10 a beegah. Now unless in the case of agricultural holdings (and these fall under the rent law) there is no law to compel landlords and tenants to enter into a contract which they are not inclined to enter into. If the defendant in the present case is holding the plaintiff's lands and premises at an inadequate rent, and has no right to hold the same without alteration of the rate, the plaintiff cannot by proceedings in the Civil Court compel the defendant to pay at a

Digitized by Google

higher or enhanced rate. The procedure in such cases is of a different nature. The judgment of the Lower Appellate Court must be reversed, and the plaintiff's suit dismissed with costs.

The 16th September 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Promises—Consideration.

Case No. 1150 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Dacca, dated the 2nd March 1874, *reversing a decision of the Additional Subordinate Judge of that district, dated the* 30*th May* 1873.

Mr. Mackertich Peter (Defendant) *Appellant,*

versus

Mr. Pogose Vardon (Plaintiff) *Respondent.*

Mr. W. C. Bonnerjee and *Baboo Umbika Churn Ghose* for Appellant.

Mr. C. Jackson, Baboo Doorga Mohun Doss, and *Moulvie Serajul Islam* for Respondent.

Where, by reason of a promise, the promisee refrains from bringing a suit, which, but for the promise, he may have brought, there is good consideration for the promise; but, if at the time of the promise, no remedy remained to the promisee by reason of limitation, there is no valid consideration, and the promise cannot be enforced at law.

Jackson, J.—THE facts of this case are sufficiently stated in the judgments of the Courts below, and the question which we have to determine in special appeal is whether upon the facts found by the Lower Appellate Court, the defendant, Mackertich Peter, is liable to pay the amount claimed in the plaint. The only explicit finding of the Judge upon which it appears to us that liability can be founded is that as to the promise made by the defendant in June or July 1871. That appears to have been a promise that if the plaintiff then abstained from bringing a suit against the widow and personal representative of the deceased brother of the defendant, he (defendant) would pay the amount due to the plaintiff. It seems to be clear that as regards a considerable portion of the claim, *viz.*, that comprehended in the bills of July 1867 and for January 1868, the claim was barred by limitation, and that the plaintiff could not in July 1871 have brought a suit for the recovery of those amounts. In respect, therefore, of those amounts, the promise which we must suppose to have been made was made wholly without consideration. It is of course a good consideration if by reason of the promise the promisee refrains from bringing a suit which, but for the promise, he might have brought; but when at the time of the promise no remedy remains by reason of limitation, there is no valid consideration. We deferred giving judgment in this case in order to consider the question which seemed to arise upon that, *viz.*, whether the defendant could be said by reason of his previous conduct to have placed himself in such a position as to be debarred from raising the question of no consideration, that is to say, whether he had by his conduct and assurances so induced the plaintiff to abstain from bringing a suit which previously he might have brought as to be debarred in equity from raising that plea; but it appears to us that upon the finding of the Judge there was no such clear case of conduct on the part of the defendant as to place him in that position. We think, therefore, that the ordinary rule in such cases must prevail, and that the promise so made without consideration cannot be held sufficient to enable plaintiff to recover the amounts which are mentioned.

As to the sum of Rs. 400 in respect of which a bond was executed by plaintiff to Moulvie Ameenooddeen Ahmed on the 9th March 1867, we think the time must run from the date on which payment was made, and that, therefore, this sum falls within the period of limitation.

Then there remains only the amount covered by the bill of January 1869. In respect of that amount it is uncertain, as we are not able to read the account which is in the Armenian language, whether any and what portion of the claim falls within the period of limitation. As to such purchases as were made within three years before the making of the promise, we consider that the defendant must be held to be bound. The case will, therefore, go back to the Lower Appellate Court in order that it may find which of the purchases specified in that bill were made within three years of the date of the promise. In respect of the sums which do not fall within that period the suit will have to be dismissed.

Under the circumstances we think each party should pay his own costs in the suit.

Digitized by Google

The 21st September 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Act VIII of 1859 *s.* 5—*Cause of Action.*

Case No. 1045 of 1874.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 2nd March 1874, *affirming a decision of the Subordinate Judge of that district, dated the 4th August* 1873.

James Hills and another (two of the Defendants) *Appellants,*

versus

S. G. Clerk (Plaintiff) *Respondent.*

Mr. G. H. P. Evans for Appellants.

Baboo Grish Chunder Ghose for Respondent.

Where plaintiff's cause of action consisted in defendants' refusal to pay the price of certain indigo seed supplied to them, which payment ought to have been made at the plaintiff's residence in Moorshedabad, the "cause of action" was held to have arisen within the jurisdiction of the Subordinate Judge of that district, within the meaning of Act VIII of 1859 s. 5.

The words "cause of action" in that Section need not be interpreted as meaning the whole cause of action.

Jackson, J.—THE only question raised in this case was whether the Court of the Subordinate Judge of Moorshedabad had jurisdiction to try the suit. This question was decided both by that Court and by the Lower Appellate Court in favour of the plaintiff. The learned Counsel who addressed us for the special appellants argued this matter at considerable length, but those arguments were chiefly based upon English cases or upon cases arising in the original side of the High Court; and the decisions in those cases, at least those which appear to have prevailed in England, turn chiefly upon the words "whole cause of action," the term "cause of action" in England having been construed to mean the whole cause of action, and the Letters Patent of the High Court in regard to the exercise of the ordinary original civil jurisdiction contain the expression in whole or in part. In particular our attention was called to an elaborate and very learned judgment of Mr. Justice Holloway in III Madras High Court Reports, p. 384, in the case of Desouza v. Coles. It appears to us that in this case the plaintiff's cause of action consisted in this, that the defendants refused to pay the price of certain indigo seed supplied to them by the plaintiff at their request, which payment ought to have been made at the plaintiff's residence. There was, therefore, an expectation of the fulfilment of the contract within the district of Moorshedabad. We think it it not necessary to interpret the words "cause of action" as meaning the whole cause of action, and consequently the English cases and the cases decided on the original side afford no guide. Within the meaning of Section 5 of the Code of Civil Procedure that seems to be a cause of action which would entitle plaintiff to relief. We think, therefore, that the Subordinate Judge's Court at Moorshedabad had jurisdiction to try this case, and that the objection on this point must be overruled. It is agreed that the defendants have no grounds of complaint as regards the measure of damages. The special appeal is therefore dismissed with costs.

The 14th December 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Honble W. Ainslie, *Judge.*

Evidence—First Court—Appellate Court.

Case No. 1497 of 1874.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 6th April 1874, *reversing a decision of the Subordinate Judge of that district, dated the 17th March* 1873.

Brij Soondur Roy and others (Plaintiffs) *Appellants,*

versus

Bibee Kaimoonnissa and others (Defendants) *Respondents.*

Baboo Sreenath Dass for Appellants.

Baboo Mohinee Mohun Roy for Respondents.

A Court of first instance ought not, because it is satisfied upon the evidence which one of the parties has given, to prevent him from putting upon the proceedings all the evidence that he wishes to give, so that he may have his case brought fairly before the Appellate Court.

Where a party has thus been prevented in the first Court, and the evidence on the record is not deemed sufficient by the Appellate Court, the latter Court does wrong if it refuses to receive the evidence which has been excluded in the way indicated.

Couch, C.J.—THE Subordinate Judge says in his judgment:—"I consider that the

Digitized by Google

" evidence adduced in this case is sufficient to " show that Kanchun Monee died on the 4th of " Joist 1266. The letters written from Brin- " dabun where Kanchun Monee died, " together with the account sheet of the " expenses incurred in performing her sradh, " show that the date of Kanchun Monee's " death as found above is not wrong. The " documents referred to have been proved in " evidence. I would have been disposed to " make further enquiry by issuing a com- " mission to examine the witnesses residing " at Brindabun ; but as there is no rebutting " evidence on the point, and as under the " circumstances I have no reason to doubt " that Kanchun Monee died in the month of " Joist 1266, I have thought it useless to " have this case postponed by issuing a " commission for the examination of the " witnesses residing at Brindabun."

These were witnesses residing at the place where Kanchun Monee died, and therefore persons who would probably be able to give the best evidence on the subject, and the judgment shows what the Subordinate Judge understood to be the state of things at the time. He evidently did not consider that the plaintiffs had so conducted themselves that they had no right to have a commission issued. The reason he gives for not issuing one, and thereby making a further enquiry, is that he was satisfied, upon the evidence which the plaintiffs had then given, that Kanchun Monee had died on the day he named. It shows how improper it is for a Court of first instance to overlook that its judgment is liable to be appealed from, and that the Appellate Court may take a different view of the evidence from what it takes. If this had been kept in view, the Judge of the first Court would have seen that he ought not, because he was satisfied upon the evidence that one of the parties had given, to prevent him from putting upon the proceedings all the evidence that he wished to give, so that he might have his case brought fairly before the Appellate Court. It is evident that, but for the opinion of the Subordinate Judge in their favor, the plaintiffs would have had a commission issued and have been able to give further evidence.

The District Judge differed from the Subordinate Judge as to the effect of the evidence which there was in the case, and said there was really no evidence that Kanchun Monee died at the particular date which is stated. If he thought that there was no evidence, by which he must mean that the evidence did not amount to proof of the fact, it became important that the plaintiffs should be at liberty to supply the want which had been occasioned by the Subordinate Judge taking a different view. But the District Judge refused to allow any of this evidence to be given upon the ground, as he says, that it had not been *bonâ fide* or properly asked for by the plaintiffs. He says :—" No interro- " gatories were ever filed," and further on, that " it is not shown me that the Lower Court " was ever asked to issue a commission for " the examination of witnesses apart from " these documents, and therefore I am of " opinion that the plaintiffs are not now " entitled to what they ask."

Now it is admitted by the pleader who appeared for the respondent that there is a mistake here. One set of interrogatories for the examination of witnesses was filed, and, apparently for the purpose of answering them the documents need not have been re-referred to. Then the plaintiffs appear to have been advised that it might be proper to put other questions for the answering of which the documents would have to be used, and they asked to be allowed to file supplementary interrogatories. No doubt they did thereby postpone the issuing of a commission, but it is not correct to say either that no interrogatories were ever filed, or that the Lower Court was not ever asked to issue a commission for the examination of witnesses apart from the documents. What the Subordinate Judge says in his judgment shows that there had been on the part of the plaintiffs a sufficient asking for a commission to be issued. In fact, he says if I were not satisfied with the evidence that there is, I would issue a commission and make further enquiry.

In this state of things, it appears to us that the Judge was wrong in refusing to receive the evidence which had been in this way excluded in the first Court, and in reversing the decision of the Subordinate Judge and deciding against the plaintiffs upon only a part of the evidence which they might have given in the suit, and which it seems they would have given if they had not been stopped by the Subordinate Judge. Justice required that the plaintiffs should be allowed to produce that evidence, and then it would have been for the District Judge to decide the case upon the whole of the evidence that was so laid before him. His decree must be reversed, and the suit must be remanded to him for retrial that he may take that course. The costs will follow the result.

Digitized by Google

The 15th December 1874.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Disregard of Evidence—Error in Law.

Case No. 1518 of 1874.

Special *Appeal from a decision passed by the Officiating Additional Judge of 24-Pergunnahs, dated the 7th April 1874, reversing a decision of the 2nd Subordinate Judge of that district, dated the 24th March* 1873.

Heera Lall Ghose and others (Plaintiffs) *Appellants,*

versus

Kalee Doss Mookerjee and another (Defendants) *Respondents.*

Baboos Mohesh Chunder Chowdhry and *Hem Chunder Banerjee* for Appellants.

Baboos Sreenath Doss and *Mohinee Mohun Roy* for Respondents.

A complete disregard of evidence which, although not conclusive and an estoppel, is of such a nature that a judgment in opposition to it cannot be allowed to stand : it amounts to an error in law.

Couch, C.J.—The plaintiff's case is that on the 20th of May 1863, their father presented a petition to the Superintendent of the suburban roads to take a settlement of 9 cottahs 12 chittacks of land contained within the boundaries mentioned, being land in excess of the road on the east side of the new Garden Reach Road, Kidderpore ; that after the rent was settled with their father, permission was given to him to fill up the land, and a pottah was ordered to be granted ; that on the 9th of September 1863 their father got into possession. They then allege that he died on the 26th of September 1863, and that after his death, their mother, on the 1st of November of that year, presented a petition to obtain a pottah of the said land, and an order having been passed for granting a pottah to her, she subsequently made an ikrar which was caused to be written by the defendant No. 1, giving to him a 12 annas share of the land, and he accordingly took possession. And they ask to have the ikrar declared not to be valid, and that their mother had no power to execute it and to convey away their rights, and that the defendant has no legal right to that share in the land.

The 2nd Subordinate Judge decided in favor of the plaintiffs, and decreed that they were to have possession of the 12 annas share of the disputed land. He says that the fact that the disputed land was acquired by the plaintiff's father Bejo Kristo and formed part of his estate, that it was not acquired by plaintiff's mother and held and owned by her, and that the ijarah pottah of the land was acquired in her name only, are satisfactorily proved by the original petition in English, dated the 1st of November 1863, filed by the plaintiff's mother in the Chief Engineer's office and sent for from that office to his Court at the instance of the plaintiffs, and which had been attested by the plaintiff Heera Lall on oath.

The defence is that the plaintiff's mother was competent to convey the 12 annas share in the manner in which she had.

The Judge, upon an appeal from this decision, held, and correctly, that there was an onus upon the plaintiffs to give evidence of the allegations in their plaint. He then says :—"There is no evidence of the fact that "possession of the land was made over by "the Government to the plaintiff's father," and "there is nothing to show that the "father ever did attend at the office and sign "the conditions, and the wording of the "order leads to the conclusion that the sign-"ing these conditions was to be a prelimi-"nary to the making over of possession." And in another part of the judgment :—"There is then on plaintiff's part no evidence that this land was ever in possession of their father ; or that a single pice of his money was expended either during his life-time or after his death in reclaiming the land or paying its rent." He no where makes any allusion to the petition of the 1st of November 1863, which the Subordinate Judge had noticed in the beginning of his judgment and treated as a very important piece of evidence, as, in fact, it is. This petition was presented by the widow before the ikrar was executed by her. It appears from some evidence that the uncle was concerned in the presentation of it, but that does not make any substantial difference. Having taken the ikrar from her subsequently to the presentation of this petition, what she stated in it is evidence against him as much as it is against her. He is bound by any admissions or statements which she made in it ; and it supports the allegations in the plaint. It says :—"I respectfully beg leave to represent

Digitized by Google

"that my late husband Bhujjo Kishen Ghose "applied on the 20th of May last to the "Superintending Engineer, Presidency Cir- "cle, for the lease of a spot of Government "ground near the new road at Garden "Reach for a term of 20 years on a rent of "Rs. 12 per annum per cottah. It would "appear from the long time that elapsed in "receiving a reply that that officer, before "passing his decision in the matter, made "enquiries as to the value of the said land; "for on the 2nd of September 1863, the "Officiating Superintendent, Suburban roads, "communicated with my deceased husband, "enquiring whether he was willing to pay "Rs. 20 per annum per cottah, and on his "accepting the offer the spot of ground was "duly made over to my late husband as will "be seen from the accompanying copy of "Superintendent, Suburban roads, letter "No. 254, dated 9th September 1863." Here is a distinct statement that the husband was asked whether he was willing to take the land at the rent of Rs. 20 per cottah per annum; that he agreed to do so; and upon this the ground was duly made over to him. Whether he actually took possession or not, the property became his; and he was the person to whom the Government agreed to let it.

The letter then says:—"On getting posses- "sion of the land in question, my late hus- "band put himself to some expenditure "towards carrying out his intentions of fill- "ing up the excavations of the ground and "building huts thereon, but subsequently, "that is, on the 24th of September 1863, "the Officiating Superintendent, Suburban "roads, addressed him again in his letter "No. 280, dated the 24th of September "1863 (copy annexed), requesting that no "further steps be taken in the matter pend- "ing the decision of the Chief Engineer."

Here is a statement that the husband did take possession of the land, which is directly opposed to the statement of the Judge that there is no evidence on the part of the plaintiffs that the land was ever in possession of their father. And there is also the statement that he expended money in carrying out the intention of filling up the excavation, opposed to the statement of the Judge that there is no evidence that a single pice of the father's money was expended either during his life-time or after his death in reclaiming the land. The petition then asks that "neces- "sary orders may be issued for confirming "the lease of the ground on the terms offered "by the Superintending Engineer and "accepted by my late husband." More cogent evidence of the plaintiff's case, that the lease was given by the Government to the husband and that he took possession of the land and began to spend money upon it, there could not well be.

That is the plaintiff's case. The defend- ant's case is that the husband did not acquire the lease, and that it did not become his pro- perty, but that his widow acquired it and had a right to dispose of it as she thought fit. We find a difficulty in understanding how the Additional Judge omitted to take any notice of this petition. We can under- stand, if it had escaped his attention, his saying that there is no evidence in the pass- age in his judgment which we have read, but with this petition before him, we think it was altogether erroneous to reverse the decree of the first Court. Such a complete disregard of evidence, which, although not conclusive and an estoppel, is of such a nature that a judgment in opposition to it cannot be allowed to stand; it amounts to an error in law. The decree of the Lower Appellate Court must be reversed, and the judgment of the first Court will stand, with costs in this Court and in the Lower Appel- late Court.

The 15th December 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Post-nuptial Contracts—Public Policy—Contract Law—Act IX of 1872 *s.* 57.

Case No. 1404 of 1874.

Special Appeal from a decision passed by the 1*st Subordinate Judge of Hooghly, dated the* 25*th April* 1874, *reversing a decision of the Officiating Sudder Moon- siff of that district, dated the* 31*st December* 1873.

Mussamut Poonoo Bibee (Plaintiff) *Appellant*,

versus

Moulvie Faez Buksh (Defendant) *Respondent*.

Mr. R. T. Allan for Appellant.

Mr. J. S. Rockfort for Respondent.

Digitized by Google

Post-nuptial contracts are not a mere nullity at law.

Where a husband stipulated in such a contract to do nothing without the permission of his wife on pain of immediate divorce and realization of *den mohur*, and also to pay over to her all the money he might earn, these stipulations were held to be illegal, because contrary to public policy. The last stipulation, however, was construed to mean payment after reasonable deduction on account of the husband's necessary expenses, and in a suit to enforce such a contract, the Court decreed to the plaintiff (the wife), a fair sum for her maintenance holding that under the Contract law (Act IX of 1872 s. 57), such part only of the agreement should be enforced as was legal.

Couch, C.J.—THE suit in this case is brought upon a document which is as follows :—

"I, Faez Buksh, son of Meah Nubi Buksh, "now of the town of Chinsurah, having "executed the kabinnamah in the presence "of witnesses, do hereby execute this ikrar "to the effect that I shall never give you "trouble in feeding and clothing you ; that "I shall make over to you, and to no body "else besides you, whatever money I shall "draw from employment ; that I shall never "exercise any violence on you ; that I "shall never assault or abuse ; that I shall "not take you anywhere else away from "your home ; that it will not be within my "power to marry or make any neka without "your permission; that I shall not prevent "those men from visiting you who may bear "any relationship to you, or come to you "for conducting your law suits, but they "only and no body except themselves will "have the liberty of seeing you ; that I "shall do nothing without your permission ; "that if I do anything without your per-"mission, you will be at liberty to divorce "me and realize from me the amount of "*den mohur* forthwith, and this neka will "then be null and void. I execute this "ikrar of my own free will to give effect "to the above conditions."

The plaintiff is the person referred to by the words "I shall make over to you, and to no body else besides you, whatever money I shall draw from employment." The plaint alleges that the defendant, on the 18th of December 1871, obtained a situation in the Madrissa at Calcutta on a salary of Rs. 40 a month, and after that he has been engaged in the Chinsurah College at a salary of Rs. 60 a month, and is still employed there, and during this time he has paid to the plaintiff only Rs. 54. It then states that he has acquired altogether a sum of Rs. 565-5-6-2-2, and claims the balance after deducting the Rs. 54, and the suit is brought for that.

A question was raised whether this agreement was executed before or after the marriage. It was contended that it was after the marriage, and therefore that there was no consideration for it. The Subordinate Judge, against whose decision the present appeal has been brought, says that it is evident from the contract itself and proved by the evidence of plaintiff's witnesses, that the marriage was not the consideration for it. But supposing it was made after the marriage (although the evidence seems to show that the execution of this instrument and the formal marriage were parts of one transaction) and therefore that the marriage cannot be considered as the consideration for it, it is admitted that it was registered ; and then it comes within the provision of the Contract Act which makes it unnecessary that there should be a consideration. Section 25 of that Act says that an agreement made without consideration is void unless it is expressed in writing and registered under the law for the time being in force, and is made on account of natural love and affection between parties standing in a near relation to each other. This agreement comes within that provision, and when the Judge says that according to the principles of law post-nuptial contracts are a mere nullity at law, he seems not to be altogether correct.

The question then is whether this is a contract which can be enforced. Section 24 of the Contract Act says that if any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void. That does not apply here. There was nothing unlawful in the consideration for this agreement, whether it was the marriage or the natural love and affection between these parties arising from the relation which had been created by the marriage, supposing the agreement to have been made afterwards.

If any Section of the Act is applicable to this case, it is the 57th, which says that where persons reciprocally promise, first to do certain things which are legal, and, secondly, under specified circumstances, to

Digitized by Google

do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement. It may be that some part of this agreement is void as being illegal, because it is contrary to public policy that the defendant should enter into such stipulations as we have read, namely, that he would do nothing without the permission of the plaintiff, and that if he did so she should be at liberty to divorce him and realize from him the amount of *den mohur* forthwith. It may also be said that it is contrary to public policy that the defendant should engage to pay over to the plaintiff the whole of the money which he might earn during the time the marriage continued.

But we think the fair construction of this agreement is not, as the plaintiff says, that he is to pay to her every rupee that he earns, but that he is entitled to a reasonable deduction for expenses which he must necessarily incur. And when the case comes before us this is what the plaintiff claims, and we have been told that the plaintiff is willing to take a fair sum for her maintenance, and such as may be necessary for it. We think we should look at the suit as one to enforce the part of the agreement which is legal, and not to enforce anything which the Court would be obliged to hold to be void. Therefore, treating the suit as one brought only to enforce the legal part of the agreement, and not that part which is clearly void, we think the plaintiff is entitled to recover a fair sum for her maintenance. Whilst the case was being argued, we thought that the offer which was made to take at the rate of Rs. 10 a month was a fair one, and that the defendant should be made liable to pay that. Therefore the decree of the Subordinate Judge will be reversed, and the plaintiff will be declared to be entitled to a sum of money calculated at the rate of Rs. 10 a month from the time when the agreement was executed until the time of the institution of the suit, giving credit for the Rs. 54 which the plaintiff admits that she has received. And the plaintiff will have the costs of the suit, including the costs in this Court, in proportion to the sum which she is declared to be entitled to.

The 15th December 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Partition of joint Property—Minors (their Rights and Liabilities).

Case No. 179 of 1873.

Regular Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 28th April 1873.

Kalee Sunkur Sannyal and another (Plaintiffs) *Appellants,*

versus

Denendro Nath Sannyal and others (Defendants) *Respondents.*

Baboo Bhyrub Chunder Banerjee for Appellants.

Baboos Sreenath Dass and *Bykuntnath Dass* for Respondents.

In a suit between co-proprietors, plaintiffs sought to recover exclusive possession of a mouzah which they claimed to have derived in a partition made some years before, and to have enjoyed it under the terms of that partition until they were dispossessed from it by defendant No. 1, one D N who, on the other hand, denied that he had more than a 4-anna share, alleging that plaintiffs were not entitled to the whole mouzah, and that the partition had been fraudulent and had been effected while he was a minor.

It appeared that no formalities had been observed in coming to the partition, and no record preserved of the proceedings except a list representing the result arrived at; that the division was effected simply on reference to a thakbust map, an average rental per beegah taken as the basis thereof, and a number of beegahs allotted in proportion to each individual's share. None of the ordinary precautions were taken for the protection of the interest of minors:

HELD that the partition was not made in such a way, and under such circumstances, as to be in itself obligatory on the minor, who had the option of repudiating it when he came of age or within a reasonable period after that date.

HELD that the minor could only be held to have accepted the partition if he had acted in such a way to the plaintiffs as to lead them naturally to suppose that he had done so.

Phear, J.—WE are of opinion that the decision of the Lower Court is substantially right and ought not to be disturbed.

The plaintiffs are admittedly co-proprietors with the defendants of certain property, or perhaps it should be said, were so until the

Digitized by Google

occurrence of a certain attempted partition upon which the plaintiffs rely, and the share of the plaintiffs in that property was a 1 anna 10 gundahs share. The case of the plaintiffs is that a partition of the joint property was effected in the year 1271, by virtue of which they, the plaintiffs, became entitled to the entirety of a certain mouzah Brohmokopalia; and they say that, from the date of the partition until the year 1276, they and the other co-sharers enjoyed the property according to the terms of the partition.

They admit that at the time of the partition, the defendant No. 1, that is, Denendro Nath Sannyal was a minor, and that he came of age sometime between 1271 and 1276. The precise date is not mentioned in the plaint; but it seems from the testimony of witnesses on both sides, that Denendro must have come of age somewhere in the years 1273 and 1274.

The plaint states that in 1276 "the "defendant No. 1, who was on bad terms "with us in consequence of disputes on "account of properties which had been held "by all of us as co-sharers, and who was the "most powerful of all the co-sharers as "holder of the largest share, gained over "certain tenants of some of the disputed "mehals assigned under the shares, and "forcibly and illegally dispossessed us from "mouzah Brohmokopalia appurtenant to "Turuf Chapree, in the month of Magh "1276 B.S., and has been in possession of "the same."

On this ground and on the title to the exclusive possession of mouzah Brohmokopalia which they derived from the partition, the plaintiffs seek in this suit to recover exclusive possession of that mouzah from the defendants.

The principal defendant Denendro Nath Sannyal in a somewhat carefully framed written statement says that he has not taken possession of the whole of the disputed village Brohmokopalia, but is only in possession of his own 4-anna share of it; that he never dispossessed the plaintiffs of the entirety of it, nor were they entitled as the result of any legally effected partition to the entirety of it; that the allegation of a partition which the plaintiffs make is entirely fraudulent, and that he was a minor at the time when it is said to have been effected.

It is not necessary to refer to the written statements of the other defendants.

The real issue between the principal parties to this suit is, whether or not the partition which the plaintiffs allege in their plaint and upon which they rely, was of binding effect between them and the defendant No. 1, or has become so by reason of the conduct of the defendant No. 1, since he attained his majority.

The defence raised by Denendro is to the effect that the original partition was not of such a character as to be obligatory upon him, because it was made at the time when he was a minor; that the persons who took part in making it as representing him, were not competent to bind him; that it was not as regards him a fair partition; and also that after his minority he repudiated it, and therefore it is void of effect.

On referring to the evidence by which the plaintiffs desire to establish the fact of the partition, we find that it is not by any means of a satisfactory character. Several witnesses, some of them being shareholders of the estate and parties to the act of partition, deposed to what occurred; and from their testimony it appears that the whole transaction was effected at one interview of the parties therein concerned; no document was drawn up either then or afterwards; nothing was put on paper to represent the terms to which the parties bound themselves, or to a record of the arrangement which was come to.

The first witness who deposes to the transaction and who was also a party to it, is Kashee Doss Sannyal. And he says:—"In "Turuf Chapree and Turuf Udoyakrishno-"pore, the share of Denendro Sannyal is "4 annas, and that of Kalee Sunkur and "Kylash Sunkur is one and half annas, and "my share is one and half annas. We are "in possession of Turuf Chapree and Turuf "Udoyakrishnopore according to partition. "We are in possession of those two turufs "according to private partition. The parti-"tion was made in the month of Assar or "Srabun 1271. I was then present. The "partition was made in the presence of "Boykunto Sannyal, Denendro Sannyal, "myself, Huro Sunkur Sannyal, Dwarka "Nath Sannyal, Doorga Doss Sannyal, "Sreekunt Sannyal, Mukunda Nath, Kripa "Moyee Debia, the sister of the father of "Denendro Nath Sannyal, and Chunder "Nath Lahiree. Chunder Nath Lahiree and "Prosunno Moyee, the mother of Denendro, "were present on the part of Denendro. "The whole of the mehal Brohmokopalia fell

Digitized by Google

"to the share of Kalee Sunkur and Kylash "Sunkur. That mehal appertains to Chapree. "Denendro Sannyal obtained Nondnapore "appertaining to Chapree. The plaintiffs "obtained Bonbaria in Udoyakrishnopore. "Denendro Sannyal obtained Sudhibari," and so on. On cross-examination this witness said "that Denendro Sannyal was 15 or 16 years "old at the time of partition. No docu- "ment was executed relating to the partition. "No ameen was appointed for the partition. "We made the partition by referring to the "survey map. I do not recollect for what "year that was the survey map. No jumma- "bundee was made nor was any measurement "made. The quality of the land and the places "of the ayil were ascertained by referring to "the map". . . Then again :—"Gobind "Nath Sannyal (one of the shareholders) "was not present at the time of partition, "but the partition was made after taking his "permission. He sent his written permis- "sion from Benares.". . . Again :—"Uma "Sunkur Sannyal was a minor at that time. "Prosunno was also a minor."

The next witness Doorga Doss Sannyal deposes very much to the same effect. And on cross-examination he says :—"The parti- "tion was not made after making measure- "ment. No jummabundee was made. The "partition was made by referring to the "survey papers. The quality of land was "ascertained from the survey papers. The "quantity of the land was also ascertained "from the survey papers. I do not see of "what year the survey papers were referred "to. I cannot exactly say what was the pro- "fits of the mehals which fell to my share "at the time of partition. I do not recollect "what was the profit of the mehals which "fell to the share of Denendro at that time. "An average of the land being made at the "time of partition, a list was made of the "same. I have not got that list with me, "and I do not recollect with whom it is. "That list was written at Salop. I do not "recollect the date. I do not also recollect "who wrote the said list." He afterwards says :—"Denendro was 12 or 14 or 15 years "old at the time when the partition was "made. Uma Sunkur Sannyal was a minor "at the time of the partition. Shoshi Dhur, "Dhuronee Dhur, and Umesh Chunder "Sannyal were minors. Prosunno Sannyal "was also a minor."

But, perhaps, the most important witness on the part of the plaintiffs is Chunder Nath Lahiree, who is said to have acted on the occasion of the partition as the manager and representative of the 1st defendant Denendro. He says :—"I was present at "the time of the partition. The partition "was made in the month of Assar 1271. "The partition was made amongst the "Sannyal co-sharers. Prosunno Moyee, the "mother of Denendro Sannyal, was his guard- "ian, and I was the manager. I was appoint- "ed as manager by Guroo Churn Sannyal, "the father of Denendro. The mehal Brah- "mokopalia fell to the share of the plaintiffs. "I cannot exactly say what is the amount "of annual collection of that mehal. The "share of the plaintiffs is one and half anna. "The share of Denendro Nath Sannyal is "four annas. We, Boykunto Nath Sannyal "and others, brought a copy of the thakbust "survey map, and the partition was made "by referring to the quantity of land "contained therein. The partition was "made at Salop. The Sannyals asked for "money from the ryots in order to pay off "the amount of the decree of Dwarka Nath "Tagore, at which the ryots said that 'we "can pay the amount of the decree if you "make a partition amongst you.'" . . . Afterwards he says :—"I partly recollect the "mehals which fell to the share of the "other co-sharers, and I have got with me "the list which was made out for the "partition." Then he reads from the list the mouzahs which fell to the share of Denendro Nath Sannyal. He says :—"To the "share of Denendro Nath Sannyal fell the "whole of the mouzahs Nondnapore, Sudhi- "bari, Kaligunge, Udayapore, Kamarpore, and "Hijli, and the lands of Kansona. I do not "recollect what quantity of land was obtained "by him. The other co-sharers have obtained "the mouzahs Chapree and Udoyakrishno- "pore, and they are in possession of the "same." Unfortunately this list was not put in. Afterwards, on detailed examination in chief by the pleader of the plaintiff, he gave the contents of it, and according to the account so given certain entire mouzahs were given to each of the shareholders, and also certain number of beegahs in other mouzahs. On cross-examination by the pleader for the defendant, he says :—"This list "was with me. A copy of this list was "with me. A copy of this paper was made "for each of the co-sharers. It was not "signed by any one. The plaintiff got a "copy of this list. Kalee Doss Sannyal got "a copy, and as I was the manager on the "part of Denendro, therefore I have got this "copy of the list. This list is not a docu-

Digitized by Google

"ment, therefore I did not deliver it to "Denendro, together with the other docu- "ments. This list is merely a memorandum. "Boykunto Nath Sannyal gave a copy to "Denendro, and this list is remaining with "me, as no one took it." Further on, in the course of the cross-examination he says :— "I, Sreekunt, and Gobind Nath Sannyal, "were appointed managers by the will of "Garoo Churn, I acted as manager up to "the year 1273, and after that I did not act. "I did not act after Denendro Sannyal "attained his majority. Prosunno Moyee "Debia was not at home at the time when "the shares were made, but she was there "when the shares were given and taken. "The share on behalf of Denendro Nath "Sannyal was taken by his mother Prosunno "Moyee. Prosunno Moyee did not go to "the kalibaree. The asseveration on the "religion was made by Denendro Sannyal "himself at the kalibaree. He was not "then quite a minor. Afterwards his mother "was informed of it. The other two "managers of Denendro Sannyal were not "then present. I did not take any certificate "from the Court for the management. I "cannot say whether Prosunno Moyee took "a certificate or not."

There is also the evidence of one or two other persons who say that they were present on the occasion of the making of the partition, but no additional particulars are added by them excepting in the following passage of the deposition of one Kasi Mohun Chowdhry. He says he knows both the parties; he married the daughter of one of the Sannyals. He was present at the time of the partition. And on cross-examination he makes this statement with regard to what took place at that time :—"Jummabundee was "not made at the time of the partition. "Having ascertained the quantity of land "from the thakbust map, the partition was "made by making an average of the land. "After consulting together, all the co-sharers "fixed the rate of rent of all the lands at "Rs. 1-14, and the partition was made. "The rate of rent of all the lands, whether "khal, bheel or nala, was fixed at Rs. 1-14, "and the ryots consented to the rate of "Rs. 1-14 together with khal, bheel and nala. "At that time no mehal was not diluviated "by any river. Consequently, at that time "nothing was settled on that point. No "deed was executed about the said partition, "but all the co-sharers went to the kalibaree "and having made solemn affirmation, took "the shares."

And, lastly, with regard to the motive for making this partition among the sharers, we have Doorga Doss Sannyal saying :— "There being disagreement between the "co-sharers, the ryots were oppressed and "were on the point of being ruined, there- "fore all the co-sharers joined together and "made a partition."

And Chunder Nath Lahiree says :—"The "Sannyals asked for money from the ryots "in order to pay off the amount of the decree "of Dwarka Nath Tagore, at which the ryots "said that we can pay the amount of the "decree if you make a partition amongst "you."

We thus have before us all the circumstances of the partition upon which the plaintiffs rely. It appears, on the whole, that many of the co-sharers in the property which was divided were minors. No formalities were observed in coming to the partition. None of the details, no part of the investigation, if it can be said that there was any investigation, into the relative value of the different parts of the property was put upon paper. There is nothing preserved which can be regarded as a record of the proceedings of this partition transaction unless it be the list which Chunder Nath had brought into Court and was allowed again to carry away with him, and which list he said was written down at the time of the partition, and shown to the different share-holders as representing the result which had been arrived at. So far as we can gather from Chunder Nath's deposition, it appears that this list was a bare statement of the quantities of land which fell to the share of the different shareholders as the effect of the partition. We have no other means of learning what took place between the parties and what were the grounds of partition than what is afforded by the depositions of the different witnesses to which we have referred. From these depositions it would appear that the most ordinary considerations which come into matters of this kind were neglected. There was no reference made to any natural and direct sources of information with regard to the value of the different portions of the property which was then being divided amongst the shareholders. According to all the witnesses the division was effected simply on reference to the thakbust map. A certain average rental per beegah was taken upon what footing we cannot tell, as the basis of the division. And in view of this rental, a number of beegahs seem to have been allotted in proportion to the amount of

Digitized by Google

his share to each individual. It has already been remarked that these witnesses admit that several of the shareholders were minors. But none of the ordinary precautions that are necessary for the purpose of protecting the interest of minors or of persons under disqualification, appear to have been taken or thought of by any body. The defendant No. 1, Denendro, now the principal person to be considered, was represented by Chunder Nath Lahiree. And to support the plaintiff's case, it is at least necessary that this man should have had complete power to bind Denendro in the matter of effecting this partition. But it is disclosed even in the evidence of Chunder Nath himself that he was not the sole guardian of the minor. Two other persons were associated with him in this office. And although we have been told in argument that in the absence of these persons, the mother had power in conjunction with one of them, to exercise the powers of guardianship, still it appears that the mother herself was not present at the time when the partition was made. It would seem almost from the evidence adduced by the plaintiffs themselves, that every possible defect was inherent in this alleged transaction of partition. It is somewhat difficult to understand how the plaintiffs can, on the facts which they have placed before the Court, consider that fairness as regards the interests of the minor in the partition has been made out. They have not indeed attempted to prove that the partition was in fact a just and equitable partition. And it seems to us, upon the case of the plaintiffs alone, that the partition described by their witnesses was of a rough and ready character. We can without difficulty imagine from it that Denendro Nath Sanyal might find good reason when he came of age to repudiate the partition so far as he himself was concerned, and to decline to be bound by it. However this may be, we find as a matter of fact that although he took the property from the hands of his guardians as they held it for him during his minority, and as they delivered it over to him, he did even according to the witnesses of the plaintiffs' express dissatisfaction with the partition at about the earliest possible period. It is true that he did not at once throw up his possession, he did not call upon the other parties to consent to a restitution of affairs to their old state. But it appears, so far as we can gather, that he did at a very early period say that he was not content with the partition as it stood, and would only accept it if something more were added to that which had been given to him under it. And in 1276, about a year and a half after he attained his majority, he took possession of a portion at any rate of the mouzah which is the subject of suit, and to this extent invaded the exclusive possession which the plaintiffs say they had held of the mouzahs ever since the date of the partition. In the plaint it is said that the plaintiffs were entirely excluded from the mouzah by the defendant. Denendro himself, however, in his evidence says that he only took possession to the extent of his share; and he adds that to the extent of more than the plaintiffs' share, the zemindar's possession is in the ryots. And there is nothing in the evidence which has been read to us, to lead us safely to the conclusion that the defendant Denendro has in fact excluded the plaintiffs from that share in this mouzah to which they would have been entitled irrespective of the partition. But however this may be, we think as has been already remarked, that the plaintiffs have failed to make out that the partition effected in 1271 was made in such a way and under such circumstances as to be in itself obligatory upon the minor. He had at any rate the option of repudiating this partition when he came of age, or within a reasonable period after that date. And it seems to us clear from the case which the plaintiffs have placed before us that he did repudiate the partition within such a period as prevents, at any rate, the plaintiffs from being entitled to claim that he must on the ground of delay alone be held to have accepted it. There can be no question on the evidence of the plaintiffs' own witnesses as to whether he did in fact at any time ever accept the partition. He has expressed from the commencement his dissatisfaction with it. And in 1276 he committed the overt act which is now complained of, and by which he most unmistakeably declared that he would not be bound by it. It has been pressed upon us that notwithstanding he has done this, still at the same time he has held and still holds in his own exclusive possession portions of the joint property, to which he could have no right to exclusive possession excepting under the terms of the partition, and that, therefore, he must by reason of this conduct be held to have accepted that partition.

We cannot accede to this argument. As a matter of fact he has not accepted the partition; on the contrary, he has

Digitized by Google

repudiated it; and indeed he could only in equity be held to have accepted it if he had acted in such a way towards the plaintiffs as to lead them naturally to suppose that he had done so. If he had, after receiving the property from the hands of his guardian in the form which it had taken by reason of the partition, continued for any considerable time to maintain possession of it in that form without expressing his intention to avoid the partition, then the plaintiffs no doubt would have had reason to ask the Court to hold that this conduct had the effect of making the partition binding upon him. But he has not done this: so far as we can see, he has always represented to the plaintiffs that he did not intend to be bound by the partition. And in 1276, as soon as he apparently ascertained the true nature of the property and its real value, he most unmistakeably asserted his independence of the contract of partition. Doubtless in electing to avoid the partition, he subjected himself to the condition of putting the parties to it in *statu quo* so far as he was concerned in relation to them. And the plaintiffs can easily enough compel him to fulfil this condition if he has not done so. Had he himself found it necessary to seek the assistance of the Court in order to be relieved of the partition, that assistance would only have been given upon this condition. But neither of these alternative suppositions is the case before us. The plaintiffs here insist upon the partition and want to have its terms enforced; and we, on the whole, are of opinion that they have failed to make out as against the defendants their right to have the contract of partition carried into effect. Therefore the foundation upon which they brought this suit is gone. They are not entitled as against the defendant No. 1 to the entire 16 annas of mouzah Brohmokopalia. Whether they are entitled by virtue of any other right to an undivided portion of this mouzah, it is not now for us to say. They have instituted this suit upon the footing of their being entitled under the contract of partition to the exclusive possession of the entire 16 annas of the mouzah. And our decision merely has the effect of determining that they have not at this time as against the defendant Denendro any right to exclusive possession of this mouzah or of any part of it. The fact that they have failed to establish this right does not deprive them of any right of a different character if they possess it. And it would seem from the written statement of the defendant himself that as against him unquestionably they have a right, if this partition be out of the way, to an undivided 1 anna 10 gundahs share of the mouzah.

In our view, the decision of the Lower Court is correct, and therefore we dismiss the appeal with costs.

The 15th December 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

Act X of 1870 *ss.* 15 *&* 18—*Compensation—Award.*

Syud Abdool Ali, *Petitioner*,

versus

W. H. Verner, Collector, under Act X of 1870, for 24-Pergunnahs, *Opposite Party.*

Mr. C. Jackson for Petitioner.

The Advocate-General and *Baboo Unnoda Pershad Banerjee* for Opposite Party.

On a reference under Act X of 1870 ss. 15 & 18, made by the Collector for 24-Pergunnahs, who had offered compensation for certain land on the banks of the Hooghly, *viz.*, so much for the portion above the high-water mark and so much for the portion below, the Judge, concurring with one of the assessors, allowed no compensation for the land below high-water mark, and applied the money, which had been offered for the compensation, to the other part:

HELD that such a proceeding was not authorized by any provision of the Act, and that the Judge and assessor ought to have determined what was a proper compensation for each description of land.

Couch, C.J.—IN this case a rule had been granted by this Court, ordering Mr. Verner, the Collector, under Act X of 1870 for 24-Pergunnahs, to show cause why the,

Digitized by Google

award made by the Judge appointed under the Act for Calcutta and 24-Pergunnahs, in suit No. 4 of 1874, wherein the applicants and others were claimants, should not be quashed, and a new investigation directed.

The reference made by Mr. Verner under Sections 15 and 18 of Act X of 1870 is as follows :—"This reference is made, because "I have been unable to agree with the "parties interested as to the amount of "compensation to be paid for the land.

"The land is part of the fore-shore of the "eastern bank of the river Hooghly. Its "area is 5 beegahs 4 cottahs 14 chittacks "and 18 square feet. Its boundaries are: "on the north, the premises of Messrs. "Ralli Brothers ; on the south, the river bank "in the possession of Syud Abdool Ali ; on "the east, the remaining portion of the bank "of the Hooghly; and on the west, the river "Hooghly. The land is shown in the annexed "plan."

The Collector then states who he had reason to think are interested in the land, and continues :—"There have been no "damages under Section 5 or 17.

"I have tendered as compensation under "Section 11, Rs. 6,355-15.

"I have determined my tender on the "following grounds. The land above high-"water measures 11 cottahs 1 chittack and "29 square feet. I have tendered for this "at the rate of Rs. 150 a cottah, being a "higher rate than any plain land in the "neighbourhood has fetched when sold, as "far as I can ascertain. The amount of my "tender for the land above high-water mark "is Rs. 1,665-10. The land below high-"water mark measures 4 beegahs 13 cottahs "12 chittacks and 34 square feet. I have "offered for this at the rate of Rs. 50 per "cottah, or Rs. 4,690-5. Thus the total "amount offered by me is Rs. 6,355-15.

"I do not admit the right of any one "save the public to the land below high "water mark. But I understand that a "claim is likely to be put forward by some "of the persons whose names are noted "above to a private interest in this tidal "land, and it is necessary that this claim "should be settled."

The case having been thus referred by the Collector, was heard by Mr. Beaufort and two assessors. The proceeding states that the parties other than the Collector could not agree in regard to the nomination of an assessor, and therefore the Court appointed, on the part of all the owners, Baboo Dinonath Bose who was proposed by Syud Abdool Ali. Mr. Rowe was appointed assessor on the nomination of the Collector.

The award then says :—"The land to which "this case refers is described as 5 beegahs "4 cottahs 14 chittacks and 18 feet on the "left bank of the river Hooghly at Chitpore. "Of this land 11 cottahs 1 chittack and 29 "feet is above high-water mark, for which the "Collector has tendered, at the rate of "Rs. 150 a cottah, Rs. 1,665-10. The remain-"ing portion of the area, 4 beegahs 13 cottahs "12 chittacks and 34 feet is between high-"water and low-water marks, and for this "the Collector has tendered, at the rate of "Rs. 50 per cottah, Rs. 4,690-5. The total "amount so tendered is Rs. 6,355-15." It then refers to the statement of the Collector that he did not admit that any individual had an exclusive right to the land below high-water mark.

Then after stating what evidence had been given, and what claims had been made before the Judge and the assessors, the award says :—"The assessor Baboo Dinonath "Bose observes that Messrs. Ralli Brothers "paid about Rs. 5,000 per beegah in "addition to the annual rental, and that "if the zemindaree right had been included "in the purchase, they would have paid a "larger price. This is the only evidence, "and with reference thereto he awards "Rs. 5,800 per beegah or Rs. 290 per cottah. "As there is no evidence to show what "portion of the area taken is below high-"water mark, he awards at this rate for the "whole land. The amount which he awards "for the whole land is therefore Rs. 30,421.

"The assessor, Mr. Rowe, is of opinion "that the price paid by Messrs. Ralli "Brothers for land which is above high-"water mark, and on which buildings have "been erected, cannot be the criterion of the "market value of the land now in question, "which is under water, for the one cannot "be compared with the other. He has "ascertained that the greater portion of the "land is below high-water mark, and he "thinks that no compensation ought to be "paid for such land. On these grounds he "thinks that the Collector's tender is very "liberal and awards that amount."

The fair construction of this is that Mr. Rowe being of opinion that the claimants were not entitled to any compensation for the land below high-water mark, decides that the sum offered by the Collector for the land above both high-water and low-water is a liberal compensation, and awards it, not for

Digitized by Google

what it was tendered for by the Collector, but for the land above high-water mark. Taking the entire sum offered for both descriptions of land, he appropriates it to the land which he considered the claimants were entitled to have compensation for.

The award then proceeds (this being the language of Mr. Beaufort, the Judge) :—"The calculation of Baboo Dinonath Bose "is erroneous, for he has included in the "Rs. 5,000 the amount paid by Messrs. "Ralli Brothers to the occupants of the land "as a bonus for removing from it. He is "also wrong in not distinguishing between "*the* lands above and below high-water "mark, because the Collector has given the "arrears of both distinctly in his public "letter of reference, and they are also clearly "shown in the map, and as none of the "parties has disputed the correctness of the "measurement or statement, silently accept-"ing it, it must be assumed to be correct. "Mr. Rowe has rightly observed that the "claimants are not entitled to any compen-"sation for the land below high-water mark, "because they have not shown that they have "any right in it. I concur also with him "in thinking that the amount tendered for "the small margin of land above high-water "mark is ample. I cannot ascertain what "compensation is due for the deprivation "of the river frontage, because no evidence "referring to it is before me."

Thus Mr. Beaufort adopts the opinion of Mr. Rowe, for he not only says that Mr. Rowe has rightly observed that the claimants were not entitled to compensation for the land below high-water mark, but he says :—"I "concur also with him in thinking that the "amount tendered for the small margin of "land above high-water mark is ample." The expression "I concur also" shows that he intended to concur with Mr. Rowe in what was previously stated, *viz.*, that the parties were not entitled to compensation for the land below high-water. If he meant any thing else, he would differ from Mr. Rowe; so that, in effect, both Mr. Beaufort and Mr. Rowe have applied as compensation for one description of land what the Collector had tendered as compensation for both descriptions.

In a passage which follows, there is a little inconsistency, perhaps only apparent, between what Mr. Beaufort had said before and what he then says, for in speaking of apportioning the money he says :—"Now, neither of these "parties has adduced any evidence to show "that any portion of the land in question is "covered by either of these leases to which "they refer, and it is, I think, highly impro-"bable that either the mowroseedar or the "dur-mowroseedars contracted to pay rent "for the land below high-water mark," as if in apportioning the compensation he was looking upon it as including the land below high-water mark. Notwithstanding this, it appears to me to be clear that Mr. Beaufort adopted the same mode of awarding compensation as the assessor Mr. Rowe had.

Then what has in effect been done is, that although Mr. Verner had made an offer of compensation for the land below high-water mark of Rs. 50 a cottah, at the same time saying that he did not admit the right of the claimant to the compensation, Mr. Beaufort and Mr. Rowe have decided that the claimants are not entitled to any compensation for it, and have determined the question of their right to this land. Now Section 21 of the Land Acquisition Act states that as soon as the assessors have been appointed, the Judge and the assessors shall proceed to determine the amount of the compensation; and in Section 24, it is said that in determining the amount of compensation to be awarded for land acquired under this Act, the Judge and the assessors shall take into consideration, first, the market value of the land; secondly, the damage sustained by reason of severing such land from other land of the person interested; thirdly, the damage sustained by reason of the acquisition injuriously affecting his other property in any other manner, or his earnings; and, fourthly, if in consequence of the acquisition he is compelled to change his residence, the reasonable expenses incidental to such change. But there are no words in this Act which give to the Judge and assessors sitting together as they did, the power of determining the right to compensation, or the title to the land for which the compensation is to be assessed.

In Section 15 there is a provision for any question respecting the title to the land or any right thereto or interest therein by persons making conflicting claims being referred by the Collector to the determination of the Court, but there is no express provision in the Act for the decision of such questions. It would seem that they are to be decided by the Court, but not by the assessors; and the mode of doing this would appear to be by a suit in the Court. The amount which ought to be paid for the land may be determined, and then if there are conflicting claims to the land the Court may decide upon them.

Digitized by Google

In Sections 38 and 39 which refer to the apportionment of the compensation, it appears to be required to be done by the Court, that is, by the Judge; for Section 39 says, when the amount of compensation has been settled by the Court, and there is any dispute as to the apportionment thereof, or when a reference to the Court has been made under Section 38, the Judge sitting alone shall decide the proportions in which the persons interested are entitled to share in that amount. This does not apply to the present case; and there is not any provision in the Act which authorizes what has been done here, namely, the Collector has made an offer of compensation for land below high-water mark, the Judge and assessor have disregarded it and allowed no compensation for that land, and have applied the money which had been offered to the compensation for the other part. What it appears to me ought to have been done in this case is that the Judge and the assessor ought to have determined what was a proper compensation for each description of land. The Collector had made an offer for each separately, and it should have been determined how much was proper to be awarded for the land above, and how much for the land below, high-water mark. The Collector might decline to pay over the compensation which was fixed for the land below high-water mark until the right of the parties to that land had been determined in a regular way and by a tribunal having authority to determine it.

It appears to me, therefore, that what has been done in this case is contrary to law, and that we must set aside the award which has been made and return the case to the Court in order that the compensation may be assessed in the manner I have mentioned.

Jackson, J.—I entirely concur. I would only add this that in addition to the absence of any special provision for determining any question of right as between parties having conflicting claims to the land in question, there really were no such parties before the Judge in this case. Mr. Verner indeed suggested a claim of right on the part of the public to the land situated below high-water, but if there were any such valid claim, Mr. Verner, who was merely exercising the powers of a Collector under the Act, would not be the person entitled to advance it, nor does he do so. Mr. Beaufort, therefore, had not before him any conflicting claim on which he could affect to adjudicate, even if he had authority to do so.

The 16th December 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Endowments—Forfeiture.

Case No. 286 of 1873.

Regular Appeal from a decision passed by the Officiating Deputy Commissioner of Hazareebagh, dated the 30th July 1873.

Nam Narain Singh (Plaintiff) *Appellant,*

versus

Ramoon Paurey and others (Defendants) *Respondents.*

Baboo Tarucknath Dutt for Appellant.

Baboo Nil Madhub Sen and *Moonshee Mahomed Yusoof* for Respondents.

Where the objects of an endowment are not carried out, it does not follow that the property can be resumed by the heir of the original donor as if there was a forfeiture; but some person authorized by law must take steps for securing its profits to the object of the endowment.

Markby, J.—It appears to us upon reading the plaint and the document upon which, as the appellant states, his suit is based, that this suit could not be maintained. There was an absolute gift of the property to a muth for charitable purposes without any reservation. If the objects of that endowment have not been carried out by the person whose duty it was to carry them out, the result of that is, not that this property can be resumed by the heir of the original donor and taken possession of by him as if there was a forfeiture, but he or some other person interested and authorized by law so to do must take the proper steps for bringing back the property and securing the profits of it to the objects of the endowment. It is quite clear, therefore, that upon that ground this suit ought to have been dismissed. But we think the proper course to pursue in this case is to allow the plaintiff to withdraw the suit upon the condition of his paying the costs of the defendants Ramoon Paurey and Juglall Paurey, and as the plaintiff elects to take that course, the order of the Court will be that the plaintiff be allowed to withdraw this suit, and that he do pay the costs of those two defendants in this Court and in the Court below.

Digitized by Google

The 4th August 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Act VIII of 1859 *s.* 356—*Remand—Opinion of Appellate Court on partial Evidence.*

Case No. 612 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Hooghly, dated the 29th November 1873, *reversing a decision of the* 1*st Subordinate Judge of that district, dated the 7th August* 1872.

Buloram Baboo (Plaintiff) *Appellant,*

versus

Issur Chunder Baboo (one of the Defendants) *Respondent.*

Mr. C. *Jackson* and *Baboos Hem Chunder Banerjee* and *Kalee Kishen Sen* for Appellant.

Baboos Mohinee Mohun Roy and *Rajendro Misser* for Respondent.

Where a District Judge in appeal made an order of remand under Act VIII of 1859 s. 356 that evidence might be taken on one of the points raised, and at the same time recorded the impression which his mind had received on the other parts of the case, it was held that the opinion so recorded was not a judgment on appeal.

Jackson, J.—On the point argued by the learned Counsel for the appellant, we have no doubt that the opinion recorded by Mr. Walton was not a judgment on appeal so as to conclude his successor. Upon the hearing Mr. Walton found that on one of the points raised it was necessary to go into further evidence, and he therefore made an order under Section 356 that evidence on that point might be taken. At the same time when he made this order, he appears to have set down in writing the impression which his mind had received on the other parts of the case; but in the first place we think it is clear that before the Appellate Court could come to any judgment on any portion of the merits it was necessary to have the entire evidence, because it is impossible to deny that the evidence to be taken under Section 356 might affect the conclusion to be come to on the other parts of the case as well as on that involved in the order of remand: but in addition to that, we think that on a consideration of the provisions of the Code of Civil Procedure, there could be no judgment but one either in the original suit or in appeal, and that judgment is to be followed by a decree. In the present case it might have been that the Judge who heard the case in the first instance should come to a finding which might entitle plaintiff, so far as it went, to a decree, and the Judge who heard the later might, on the other part, find for the defendant. In this way we might have two discrepant opinions in the case. We have no doubt that the judgment come to by Mr. Field is the judgment in the case, and that that is the judgment to which we must look for decision of the several points that arise.

The second point has been argued by Baboo Hem Chunder Banerjee who followed. It is contended that although the plaintiff failed to make out the case as set out in the plaint, yet he having been in possession for thirty years as found by the Lower Court, the defendant could not, without resorting to a Court of justice, oust him of his own will, and, as the Baboo said, wrongfully. It seems to us that in this case the land having been found to be the property of the defendants, the plaintiff could not have a right to be restored to possession, even if we admit that the Judge did not supersede the finding of the first Court as to his possession, when there was no title in him which gave him a right to retain possession against the rightful owner. We think the suit was properly dismissed, and this appeal must be dismissed with costs.

Digitized by Google

The 4th August 1874.

Present :

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Hindoo Law—Inheritance—Blind and Deaf Persons.

Case No. 578 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Dacca, dated the 16th December 1873, affirming a decision of the Officiating Subordinate Judge of that district, dated the 16th September 1872.

Mohesh Chunder Roy and others (Defendants) *Appellants,*

versus

Chunder Mohun Roy and others (Plaintiffs) *Respondents.*

Mr. C. Jackson and *Baboos Golap Chand Sircar* and *Sreenath Banerjee* for Appellants.

Baboos Mohinee Mohun Roy and *Nullit Chunder Sen* for Respondents.

The Hindoo law current in Bengal excludes from inheritance persons born blind and deaf, not those who have become so afterwards from some adventitious cause.

Jackson, J.—THE question raised in this special appeal is whether the plaintiff Chunder Mohun Roy is excluded from his share of inheritance by reason of his having become blind at a period of about two years before the succession opened. The Subordinate Judge in whose Court the suit was brought, and the District Judge who heard the appeal, both decided that the plaintiff is not excluded by the Hindoo law, and the object of this special appeal is to show that the Hindoo law current in Bengal does exclude a person under such circumstances. In a matter of this sort, it appears to us that the case should be ordinarily concluded by the authority of the text-books which are regarded as the first authority in Bengal, and first of all those books undeniably is the Dayabhaga. The Dayabhaga in Chapter V which is devoted to that subject sets out, in paragraphs 1 to 9, the persons who are excluded from various causes. In paragraph 10 the enumeration is repeated, and in that paragraph and paragraph 11 the right of such persons to maintenance is insisted upon. The enumeration which the Dayabhaga contains is in these words:—"Impotent persons "and outcasts are excluded from a share "of the heritage; and so are persons born "blind and deaf; as well as madmen, "idiots, the dumb, and those who have lost "a sense [or a limb]"—the translation being alternative. That phrase seems clearly to indicate the meaning of the author who quotes it that the exclusion refers to persons born blind and deaf, not to persons who afterwards become blind by accident. The enumeration in paragraph 10 has not for its object any variation of the list of persons mentioned above, but the blind man is mentioned as a person who, though excluded, must be maintained. We do not think the intention was to refer to the blind man in any other sense than he is referred to by Menu.

The next authority which is not denied is the Dyacrama Sangraha, and the author of that work is even more explicit on the subject. He in Chapter III, first and second paragraphs, mentions expressly persons "born blind and "deaf, that is, by nature, not those who have "become so from some adventitious cause." He says:—"The meaning therefore is those "who are blind and deaf from the period of "their birth." As far, therefore, as those authorities are concerned, the decisions of the Courts below appear to be in conformity with the Hindoo law. But it is said that going further back and looking to the original source of the Hindoo law, *viz.*, the original text of Menu, we ought to put a strict interpretation on that law. The phrase referred to is Chapter IX, Sloka 201, which is at page 214 of Mr. Grady's Edition. That is in these words :—"Eunuchs and out-"casts, persons born blind or deaf, madmen, "idiots, the dumb, and such as have lost the "use of a limb, are excluded from a share "of the heritage." Now if it be contended that by the expression "such as have lost "the use of a limb," the exclusion is carried beyond what is implied in the former part of the Sloka, it must be clear that the person to be excluded must be incurably blind, or such as has lost the sense of sight. Here the evidence does not show anything of that sort. The plaintiff has not lost his eyes nor is there anything, as we understand, to show that he is incurably blind. Therefore if we are to go on that Sloka, we do not think he would be necessarily excluded. Speaking for myself I should rather base my judgment on

Digitized by Google

the two authorities on the Hindoo law as are current in Bengal. I mean the Dayabhaga and Dyacrama Sangraha. A rule of Hindoo law which is relied upon as preventing the natural course of inheritance ought to be clear and unmistakeable. We think, therefore, that this special appeal must be dismissed with costs.

The 11th August 1874.

Present :

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Revenue Suits—Revenue Agents—Presumptions as to Procedure.

Case No. 800 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Backergunge, dated the 30th December 1873, *reversing a decision of the Officiating Additional Moonsiff of Burrisal, dated the 30th April* 1873.

Khaja Ahsanoolah (Plaintiff) *Appellant,*

versus

Jusoda (Defendant) *Respondent.*

Baboo *Gooroo Doss Banerjee* for Appellant.

Baboo *Kashee Kant Sen* for Respondent.

As in civil suits, so in revenue suits, all things must be presumed to have been correctly done. It is not necessary to inquire into the instructions which revenue agents receive, and, until the contrary is shown, the parties must be held to have been properly represented and to be bound by the decisions.

Jackson, J.—THE judgment of the Lower Appellate Court in this case, as the respondent's vakeel tardily admitted, cannot be supported. The plaintiff sued to recover from the defendants rents of a talook and of an oosut talook. His case was that by certain deeds called tahoots alleged to have been executed by the defendants after the purchase of the superior landlord's right by plaintiff, the rents of these two tenures were fixed for that time at Rs. 401 and Rs. 624 respectively, but that the tahoots contained a stipulation that those rents should be subject to enhancement if on measurement the area of the lands was found to be larger than was then supposed to be, and that accordingly in 1271 measurement was made, and the jumma increased to Rs. 488 and Rs. 706 respectively. The tahoots were produced but were not formally proved. The plaintiff, however, adduced evidence in the shape of judgments against the defendants, showing that rents had been recovered at the rates fixed by the tahoots, we understand. The Moonsiff declared himself satisfied as to the execution of the tahoots, believing them to be genuine documents and reciting the fact that it appeared that the witnesses to the execution of these documents were dead. He also relied upon the judgments produced by plaintiff, and gave plaintiff a decree for rent at the rates mentioned in the tahoots. It seems that only one of the defendants, *viz.*, Jusoda, defended the suit, and she appealed to the District Court. The Judge in the course of his judgment declared himself to be morally convinced of the justice of the plaintiff's case, but said that he was debarred from giving plaintiff a decree by reason of the failure of any legal formal evidence. As to the tahoots, he states that the Moonsiff was mistaken in his observation that the attesting witnesses were dead inasmuch as only one, *viz.*, Nilambar Chatterjee, was dead, and several are admittedly living, especially Asgur who appears to have been both a gomastah of the defendants and a mirdha of the plaintiff. Now the fact, as shown to us at the hearing of this appeal, is that one of the witnesses for the plaintiff No. 18 expressly stated that the writer and the attesting witnesses were dead. There may be some failure of absolute accuracy in this statement, because it does appear that Asgur, one of the attesting witnesses, is still alive. As to this witness, the Judge remarks on a different part of the case that the non-examination of Asgur tells as much against the defendants as against the plaintiff, for there is reason to believe that he is now on their side, and this observation receives strong confirmation from the fact that it was this very Asgur (at least the name of Asgur leads one to that conclusion) who acted as agent of the defendant Jusoda and filed her written statement. Under these circumstances, the plaintiff could hardly be rigorously dealt with for having omitted to call this Asgur, and although he was the surviving attesting witness and ought to have been called, still the facts as we are now stating them take away very much from the cogency of the reasons assigned by the Judge for putting the tahoots aside. But there is a still stronger fact. It appears that subse-

Digitized by Google

quent to the execution of the tahoots, there has been litigation between the parties. The other defendants, who were sworn in that litigation, did not defend the suit and did not appeal to the Judge. Jusoda alone resisted the plaintiff's claim, and as to her the Judge says in respect of a decree of 1861 :—"The "present appellant is not bound by the admis- "sion of Kala Chand or by the depositions of "Gour Chand and Radha Gobind, and as she "denies all knowledge of the decree of 1861 "execution of which against her is neither "proved nor alleged, it does not seem to me "that it is binding upon her now." The Judge, it seems, declares her not to be bound by that decree because she denied all knowledge of it, and because execution against her was neither proved nor alleged. Now it seems to us that her denial of all knowledge would be perfectly immaterial, and execution would not be necessary to make the decree binding upon her. Circumstances might occur to make execution unnecessary, and as far as we can see there is no reason whatever why she should not be concluded by that decree. There seems however to be later decrees, and the Judge in respect thereof says :—"The Lower Court has, however, "specially relied upon the evidence of other "decrees as showing that the defendants all "admitted in 1863 that the jummas of the "talook and ousut talook respectively were "Rs. 401 and Rs. 624." And a little further on he says :—"On this occasion the defend- "ants were represented by mookhtears named "Gour Mohun Sen and Kalee Kishore Sen, "and they have been examined in these suits. "Gour Mohun Sen represents that he acted "on the faith of Kalee Kishore Sen, and "Kalee Kishore says the mookhtearnamah was "brought to him by Asgur." Now we appre- hend that these suits were suits in the Revenue Courts, and in Revenue Courts the defendants would be represented by persons usually called mookhtears, but who would act as revenue agents. That being so, there is no reason to doubt that the defendants were properly represented, and the same presumption would be made as to all things having been correctly done as in regard to ordinary suits. It is not usual in civil suits to inquire into the instructions that vakeels receive : no more is it necessary in revenue suits to enquire as to the instructions that the revenue agents receive; and, until the contrary is shown, the parties must be held to have been properly represented and to be bound by the decisions. As far as we can see at present, these decrees of 1861 and of 1863 appear to be not only binding, but conclusive against the defendant. Inasmuch, therefore, as the Judge by mistake apparently refused to consider these decisions, and inasmuch as he expressed strong opinion as to the real merits of the case, it appears to us that the suit must go back to the Lower Appellate Court in order that the Judge may give legal effect to the previous decisions and to the whole of the evidence in the case. The costs will follow the result. This judgment applies to No. 801.

The 18th August 1874.

Present :

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Co-defendants—Evidence.

Case No. 747 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Dacca, dated the 29th December 1873, *affirming a decision of the Additional Subordinate Judge of that district, dated the 17th April* 1873.

Abdool Gunnee and others (Defendants) *Appellants,*

versus

Janoo Bibee (Plaintiff) *Respondent.*

Baboo Nullit Chunder Sen for Appellants.

Baboo Lall Mohun Doss for Respondent.

Where a number of defendants are interested in resisting a suit, judgment cannot be given against all, unless there is evidence which binds them all.

Jackson, J.—We are not satisfied with the judgment of the Lower Appellate Court in this case. The plaintiff, Sreemutty Janoo Bibee, a widow, brought this suit against Abdool Gunnee as representing certain infants, against Gobind Singh and Shushee Singh, who are described as the principal defendants, holders of the property without title, and against Sreemutty Mohur Bibee, the vendor of the plaintiff, for the declaration of title and recovery of possession by distinct partition with mesne profits, &c., the suit being valued at Rs. 1,700, and the claim related to four pieces of land, Nos. 1, 2, 3, and 4.

The defendants in the first place stated that as to the land Nos. 2 and 3, they had not

Digitized by Google

been in possession at all, and had no concern with those portions of the claim, and this denial of theirs appears to have been accredited, and the plaintiff's suit in that respect was dismissed. As to the other two pieces of land, Nos. 1 and 4, the Subordinate Judge who first tried the case said that this was a very clear case. He went on to show what it was that made the case quite clear to him, *viz.*, that an attempt was made by Abdool Gunnee and others, the present defendants, to take possession of these lands on which the plaintiff's vendor applied, for relief under Section 230, when Abdool Gunnee came in and admitted that the lands referred to in that claim were not lands decreed to him and the other decree-holders. Thereupon the applicants under Section 230 were ordered to retain possession of the lands. As to that piece of evidence the co-defendants complained that it was an admission by Abdool Gunnee alone, and not therefore binding on them. As to this the Subordinate Judge says :—"It is an admitted principle of the "law that when more than one person "jointly bring a suit, the evidence of one of "them which proves the allegation of the "adverse party must be binding on all." The Subordinate Judge does not say where he finds this principle. This moreover, is not the evidence of one of such persons. It is an admission made by one of them in other proceedings. We cannot say that this admission would be evidence against any person other than the persons who made it, and then it must be made out clearly that the admission related to that which forms the subject of the present claim. The Subordinate Judge then goes on to find whether the disputed lands Nos. 1 and 4 were the same identical lands which the decree-holder defendants could not on the application of the plaintiff's vendor take possession of under their decree, that is to say, whether the disputed lands were the same to which that dispute related ; and he is of opinion that they were. Then there is a paragraph to the effect that "the evidence adduced by plaintiff shows that the disputed "lands Nos. 1, 2, and 3, are the resumed "lakheraj lands, and No. 4 is the shikmee "land, and the plaintiff acquired title and "interest thereto by purchase from his vendors. The plaintiff's possession of the "lands Nos. 1 and 4 down to the date of dispossession is proved by the evidence of "witnesses examined in this case." On this ground, he holds that plaintiff is entitled to recover possession of Nos. 1 and 4.

On appeal the Judge does not seem to concur with the Subordinate Judge as to the efficacy of the admission, but his judgment appears to us a little contradictory. He first compares plots Nos. 1 and 4 of the present case with plots 4 and 11 of the claim case, and after consideration of the boundaries he comes to the conclusion that they are identical, though we must confess his reasoning is not very satisfactory to our minds ; and as to the admission although the Judge considers Abdool Gunnee to be bound by it, he holds that the other defendants are not so bound. Now if Abdool Gunnee and these other defendants are all interested in resisting the plaintiff's suit, we think judgment could not be given against all, unless there were evidence which bound them all. Besides, the Judge does not advert to the evidence referred to by the Subordinate Judge showing that the disputed lands were resumed lakheraj and shikmee lands to which the plaintiff acquired title by purchase. We think it was necessary for the Judge to go fully into that evidence and to be satisfied that the evidence was such as entitled plaintiff to recover possession. There are circumstances in the case which appear to us to throw considerable doubt upon the *bona fides* of this suit, and which, therefore, ought to be taken into consideration. It appears that a suit was in the first place brought in the Small Cause Court for the value of straw carried away by defendants. That suit being dismissed, another was brought in the Sudder Moonsiff's Court by plaintiff and her vendor for recovery of possession by ejectment of the defendants. Thereupon, defendants Nos. 2 and 3 raised the objection that the suit was under-valued, on which plaintiff having obtained leave to withdraw from that suit purchased the rights of Mohur Bibee by a kobalah, dated the 17th Chyet 1278 and in that way became proprietor of the whole 16 annas of the property, and then brought a fresh suit to recover the lands *in formâ pauperis*. It is alleged at the foot of the plaint :—"I sold my other properties for "Rs. 375 and paid off debts. Out of "the said amount I had Rs. 25 only "with me, which will be required to meet "the expenses in this suit." This is so curious a statement that it seems to require more sifting investigation, and it appears to us that the Judge ought to be thoroughly satisfied that this is a *bonâ fide* and honest suit before he gives plaintiff a decree. The case will be accordingly remanded to the Lower Appellate Court. The costs will follow the result.

Digitized by Google

The 18th August 1874.

Present :

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Surplus Proceeds—Liability.

Case No. 902 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 17th December 1873, modifying a decision of the Sudder Moonsiff of that district, dated the 24th April 1873.

Gunga Dhur Kur (Plaintiff) *Appellant,*

versus

Roop Chand Kooer (one of the Defendants) *Respondent.*

Baboo Tarucknath Dutt for Appellant.

Baboos Kalee Kishen Sen and *Nil Madhub Sen* for Respondent.

A party taking out his own share of surplus proceeds in deposit in a Collectorate, jointly with another who is in possession of a certificate of the Civil Court, is not liable for the money drawn by that other, even if drawn without any real title.

Jackson, J.—THIS suit, as brought against Roop Chand, was hopeless from the first. It appears to us that Roop Chand could not be liable to the plaintiff. He was under no obligation to enquire into the rights of the parties touching the share formerly belonging to Mahomed Diem. The surplus proceeds were in deposit in the Collectorate, and he had every right to take out his own share. He did so jointly with a party who he saw was in possession of a certificate of the Civil Court, and the circumstance that that party had really no right to draw the money would not make Roop Chand liable. It seems to us that Roop Chand was fully justified in making the statement he did, and taking out his own share of the money, which is all he took. The special appeal will be dismissed with costs.

The 19th August 1874.

Present :

The Hon'ble L. S. Jackson and W. F. McDonell, *Judges.*

Lower Appellate Court—New Plea—Act VII (B.C.) of 1868—Irregular Sales.

Case No. 923 of 1874.

Special Appeal from a decision passed by the 3rd Subordinate Judge of 24-Pergunnahs, dated the 20th January 1874, affirming a decision of the Moonsiff of Alipore, dated the 30th June 1873.

Raj Lukhee Dassee and another (Plaintiffs) *Appellants,*

versus

Pearun Bibee and another (Defendants) *Respondents.*

Baboo Umbika Churn Bose for Appellants.

No one for Respondents.

A suit by a mortgagee for possession of the mortgaged property which had been sold under Act VII (B.C.) of 1868, where plaintiff alleged that the sale was brought about by fraudulent withholding of the rents and that the mortgagor had purchased it *benamee*, having been dismissed, an appeal was preferred when the plaintiff appellant raised a further question as to whether the sale conveyed any thing more than the right title and interest of the mortgagor.

HELD that the Lower Appellate Court would have been justified in throwing out this plea.

HELD that where a sale has been held under the provisions of Act VII (B.C.) of 1868, but improperly and irregularly, it can only be questioned by a suit brought within proper time and against proper parties.

Jackson, J.—THE ground of the present action was that one of the defendants Pearun Bibee had mortgaged the land to which the suit related to the plaintiff's husband; that while the mortgage remained in force and the mortgage money was unpaid, the defendant Pearun had fraudulently caused the holding to be sold by withholding the rents of it—the rent being payable to Government as the land was situate in Punchannogram,—whereupon the purchase was made ostensibly by the second defendant Jobaree Mundul, but really on behalf and for the benefit of Pearun Bibee herself; that Pearun continued in possession and was still the real owner, and the suit therefore was to get possession of the property as if there had been no sale. The cause of action, we know not why, is said to have arisen on the 11th March 1872. While the case was under the consideration

Digitized by Google

of the Court of first instance, the law under which the sale took place was considered and declared, without any objection having been taken to the point, to have been Act VII of 1868 (B.C.) That is mentioned as a matter not in dispute. The Court therefore went into the question of fraud and found that the allegation was not proved. The suit was accordingly dismissed. In the Apellate Court, the plaintiff seems to have raised a further question whether the sale by the Deputy Collector conveyed any thing beyond the right title and interest of the morigagor, and it seems to have been brought to the notice of the Court that the sale certificate filed by Jobaree recited the authority for the sale to have been Act VIII of 1859. The Subordinate Judge was of opinion that that was merely a clerical error, that the sale could not take place under Act VIII of 1859, and that it was a sale under the Bengal Act of 1868. The question of fraud was again urged, and the Appellate Court as well as the first Court found that no fraud had been proved.

The plaintiff in special appeal again raises the question as to the effect of the sale. As to that, the first and sufficient answer we think is that this was not the ground of the plaintiff's suit. It does not seem to have been at all raised in the Court of first instance, and we do not hear of it until the case reached its appellate stage. We think, therefore, that the Lower Appellate Court would have been quite justified in throwing out this plea, when it was raised for the first time on appeal; but beyond that it appears to us that the Lower Appellate Court is right, because the thing sold in the present case was the tenure on which default took place, and the authority to sell that tenure is contained in Act VII (B.C.) of 1868 We are told that at the time when the sale took place, *viz.*, in May 1871, the power to sell under the Act had not been extended to the Collector of 24-Pergunnahs, but there is nothing before us by which that contention is supported, and we concur with the Lower Appellate Court in thinking that there are no provisions in Act VIII of 1859 under which this tenure could be sold. Section 18 and the following Sections seem to provide the alternative procedure to be resorted to when arrears cannot be recovered by the sale of the tenure itself. The use of the words "Act VIII of 1859" in the certificate of sale can be reasonably supposed to be the result only of a clerical error. If we were to assume that the sale was held under the provisions of Act VII of 1868 but improperly and irregularly held, then the sale must be questioned by a suit brought for that purpose within proper time and against proper parties. This is not a suit of that description.

The special appeal is dismissed, but without costs, the respondent not appearing.

The 20th August 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Duties of Parties—Procedure.

Case No. 1012 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 2nd April 1874, *reversing a decision of the Moonsiff of Pundooah, dated the 29th October* 1873.

Nobin Chunder Roy Chowdhry and others (Defendants) *Appellants,*

versus

Anungo Munjuree Debia (Plaintiff) *Respondent.*

Baboos Hem Chunder Banerjee and *Aubinash Chunder Banerjee* for Appellants.

Baboo Bhowanee Churn Dutt for Respondent.

Parties who have the benefit of legal advice ought to be left to manage their own cases, without interference from the Court. Where the evidence of a witness, or the citation of a document, is material to a plaintiff's case, it is his business to move the Court to take the necessary steps in the matter.

Jackson, J.—We are of opinion that the order of the Subordinate Judge in this case is erroneous and not warranted by law. He attributes to the Moonsiff a series of errors which, as far as we can see, are not shown to be at all the errors of that officer, but are omissions of the plaintiff. He seems to think that because the plaintiff had filed a copy of the kobalah which was not admissible, the Moonsiff ought to have sent for the original. Now it is just possible that the plaintiff had her own reasons for not producing the original and submitting it to the inspection of the Court, and unless the

Digitized by Google

plaintiff moved the Court for sending for the original deed, we do not see why the Court was bound to do any thing of the kind. It is then said :—"The Moonsiff appears also "not to have taken proper steps to examine "Fuzlur Ruhman who was cited as a witness "by both parties and whose evidence was "material in this case." We do not know whether it was proved that the evidence of that witness was material, nor what steps necessary to be taken for the appearance of the witness in Court were omitted by the Moonsiff. Then another fault imputed is that the Moonsiff "neither made any mention "of the chucknamah in his decision, nor it "appears that he passed any order to "produce it or to account for its non-pro-"duction." We do not know whether it was incumbent upon the Moonsiff to do any such thing. It was the business of the plaintiff, if she required the production of that document, to take the necessary steps, and we have no doubt that the Court if applied to in proper time would have given plaintiff the needful assistance. The Subordinate Judge finally observes :—The Moonsiff states "that the plaintiff has done very little to "produce the best evidence, but to arrive at "a right conclusion he ought to have "summoned the persons named above at the "cost of plaintiff and called for the record "and chucknamah." Courts we think would do well to leave parties who have the benefit of legal advice to manage their own cases. It would never do for Courts to interfere in such matters and to undertake the business of suitors as well as that of the Judge. These remarks of the Subordinate Judge, however, would perhaps not incline us to take any action in this appeal, but it seems that upon these grounds the Subordinate Judge has done that which he had no power to do, *viz.*, he has decreed the appeal and reversed the Moonsiff's decision and has ordered that the papers of the original case be sent back to the Moonsiff in order that he may try the case having carried out the above instructions. This order must be and is hereby set aside. The Subordinate Judge will call the case from the Moonsiff's Court and decide it himself. If for the ends of justice he considers it necessary to admit any further evidence which may be tendered and finds himself authorized to do so, he may receive it after recording his reasons. Having done so he will dispose of the case himself. Under the circumstances, we think the defendants will be entitled to their costs of this appeal.

The 24th August 1874.

Present :

The Hon'ble L. S. Jackson and W. F. McDonell, *Judges.*

Suit by Mortgagee—Costs.

Case No. 292 of 1873.

Regular Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 8th September 1873.

Goburdhun Bysack and others (Plaintiffs) *Appellants,*

versus

Sonatun Bysack (one of the Defendants) *Respondent.*

Baboos Kalee Prosunno Dutt and *Mohinee Mohun Roy* for Appellants.

Baboo Kashee Kant Sen for Respondent.

Where a mortgagee, having the option of selling the mortgaged property or suing the mortgagor, elected the latter alternative and obtained a decree, his costs were disallowed by the Appellate Court. The defendant having committed further default as to instalments, the plaintiff sued him again, and the first Court decreed the suit without costs :

HELD that the first Court could not do otherwise than follow the rule previously laid down by the Appellate Court as to costs ; but that should the defendant default again, it would do well to consider the whole circumstances of the case.

Jackson, J.—THIS is an appeal on a matter of costs, and it may be admitted that the position of the appellants who are plaintiffs is somewhat embarrassing. As the result of a litigation commenced, we believe, in the late Supreme Court, but concluded in the original side of the High Court, a mortgage deed was executed by the order of the Court in October 1866, whereby a sum of money was declared to be due to plaintiffs payable by quarterly instalments and secured by a mortgage of immoveable property, and it seems to have been declared that the plaintiffs had the option either of suing to recover the money or of bringing the property to sale under the power of sale contained in the deed, the property being situate in the mofussil, where also both the plaintiffs

Digitized by Google

and the defendant appear to reside. A previous suit was brought in respect of certain over-due instalments, and was resisted by the defendant on various grounds, amongst which was the objection that the suit could not lie. They obtained a decree, however, which was appealed to this Court, and this Court affirmed the decree, but with this modification that the learned Judges before whom the case was heard were of opinion that the plaintiffs might have proceeded by sale of the mortgaged property under their powers of sale, and that having the option of so doing or of bringing a suit, and having elected to bring the suit which put the defendant to expense and trouble, they were not at liberty to recover the costs of such suit from the defendant, and therefore they disallowed the plaintiff's costs. Since then a further default has been committed as to further instalments and the plaintiffs brought this further suit, and the Subordinate Judge having to determine this matter has very naturally, and it seems to us inevitably, followed the rule laid down for his guidance by giving plaintiffs the amount of principal and interest but without costs, and it is of this refusal of costs that the plaintiffs complain.

On appeal before us, it is contended that the defendant, by continued failure to pay, has placed himself in a worse position than in the previous suit, and our attention is called to a clause in the mortgage deed by which the plaintiffs are entitled to be recouped all costs as between attorney and client. The only question for our decision is whether the Subordinate Judge is wrong in doing that which he did, *viz.*, having the question of costs to decide, in following the rule laid down in the previous decision. It is impossible for us to say that the Lower Court is wrong in so doing. At the same time, we think, we may not unfairly intimate an opinion that the plaintiffs have been rather hardly dealt with, and that if the defendant should again place himself in such position as will necessitate the bringing of further suits in respect of future instalments, the Court below may do well to consider the whole circumstances of the case, and the opinion at present given, as well as the opinion of the previous Bench, if it be necessary to do so. We therefore dismiss this appeal, but as the defendant thought fit to prefer an objection under Section 348, and has put forward a claim to have his own costs, we think each party should pay his own costs of the present appeal.

The 1st September 1874.

Present :

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Rent Suit—Admission.

Case No. 1094 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Jessore, dated the 11th February 1874, *affirming a decision of the Additional Moonsiff of Nurrail, dated the 5th August* 1873.

Hulodhur Sen and others (Plaintiffs) *Appellants,*

versus

Seetul Chunder Bhoomick (Defendant) *Respondent.*

Baboos Nullit Chunder Sen and *Bipro Dass Mookerjee* for Appellants.

Baboo Bhowanee Churn Dutt for Respondent.

Where a landlord sues his tenant for rent at a certain rate, but fails to prove his claim to more than the defendant admits, he is entitled to a decree for the amount admitted to be due.

Jackson, J.—THE plaintiffs in this case sued to recover rent from the defendant at the rate of Rs. 152-10 for two alleged jummas. The defendant answered that he held no such jummas, but that he did hold one jumma at the rate of Rs. 114-4, and

Digitized by Google

of that jumma only the sum of Rs. 56 was due from him instead of the Rs. 338 claimed by the plaintiffs. The defendant, in support of his allegation, produced a pottah of the previous owner of the land. The Moonsiff tried only one issue, *viz.*, whether the defendant's pottah was genuine. That issue he found in favor of the defendant, and he accordingly held that the two suits brought by plaintiffs on separate causes of action in respect of two jummas must be dismissed. On appeal the Subordinate Judge reversed the finding as to the pottah, but he also found that the plaintiffs had failed to prove any contract or allegation on the part of the defendant to pay them Rs. 152 annually on account of the two jummas. He, therefore, dismissed the suit *in toto*: at least, he dismissed the appeal which, of course, in the absence of any further direction, had the effect of confirming the Moonsiff's decision dismissing the suit.

The plaintiffs appeal here specially, and contend in the first place that on the failure of the defendant to make out his pottah, they ought to have had the judgment. That appears to us to be a misconception. The pottah was only a part of the evidence relied upon by defendant to show that his liability was only to pay Rs. 114, instead of the amount claimed by the plaintiffs. Even if he failed in that, still it lay upon the plaintiffs to prove, if they could, that the defendant was bound to pay more than he admitted, and in the judgment of the Lower Appellate Court they failed to do so. In this state of things, it appears to us that the Lower Appellate Court, instead of dismissing the suit altogether, ought to have given judgment for the plaintiffs for the amount which the defendant admitted to be due. There was another matter raised by the defendant in his allegation that he had sold the jumma in question. This sale of his does not appear to have been recognized by the landlord and the purchasing tenant has not been registered. The defendant, therefore, appears to have been liable. We think, therefore, that although the result is not quite satisfactory, judgment should be recorded for plaintiffs for the sum of Rs. 56 which the defendant admits to be due from him. We think under the circumstances each party should pay his own costs of the present suit.

The 1st September 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Pro formâ Defendant—Appeal.

Case No. 1085 of 1874.

Special Appeal from a decision passed by the Officiating Subordinate Judge of Hooghly, dated the 12th February 1874, *reversing a decision of the Moonsiff of Serampore, dated the 5th July* 1873.

Ram Doss Lushkur and another (Plaintiffs) *Appellants,*

versus

Hureehur Mookerjee and others (Defendants) *Respondents.*

Baboos Mohinee Mohun Roy and *Bama Churn Banerjee* for Appellants.

Baboos Gopal Lall Mitter and *Ooma Kalee Mookerjee* for Respondents.

A *pro formâ* defendant against whom no judgment has been given, has no right to appeal, even if another party has been found to be the owner of land which he claims; for such finding carries with it no legal consequence as against him.

Jackson, J.—It appears to us that there is no reason for carrying this litigation further. As far as the plaintiffs and the principal defendant Hureehur Mookerjee are concerned, the effect of the judgment of the Lower Appellate Court is to dismiss the suit for damages. That was a question which had to be decided upon the evidence adduced by the parties, and there is no reason why we should interfere on a pure question of fact.

It has been pointed out by the pleader for the appellant that in this case the defendant Bama Churn Roy who was put on the record as a *pro formâ* defendant, and against whom no judgment was given by the Court of first instance, was allowed to appeal, and his appeal was successful. The vakeel who appears for Bama Churn states that he was obliged to appeal to the Lower Appellate Court, because the Moonsiff found that not he, but Hureehur Mookerjee, was the owner of the land. That, however, was not a finding or expression of opinion which carried with it any legal consequence as against Bama Churn Roy. The only thing that was done in the suit was that Hureehur Mookerjee was ordered by the Moonsiff to pay damages and to give over possession of the land to plaintiffs. The suit as against Bama Churn was

Digitized by Google

dismissed, and he, therefore, had no right to appeal, and his appeal ought to have been dismissed. As the Lower Appellate Court has decreed his appeal and given him his costs, that portion of the decree will be set aside. The effect, therefore, of this appeal is that the appeal as against Hureehur Mookerjee is dismissed with costs, and the appeal as against Bama Churn is dismissed without costs.

The 2nd September 1874.

Present :

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Issues—Defendants' Case.

Case No. 1055 of 1874.

Special Appeal from a decision passed by the Judge of Dacca, dated the 2nd March 1874, *reversing a decision of the Officiating Subordinate Judge of that district, dated the 29th May* 1872.

Shaikh Ameer Bepuree and another (Defendants) *Appellants,*

versus

Hurree Mohun Kurmokar and another (Plaintiffs) *Respondents.*

Mr. C. Jackson and *Baboos Mohinee Mohun Roy* and *Doorga Mohun Doss* for Appellants.

Baboos Chunder Madhub Ghose and *Nullit Chunder Sen* for Respondents.

Where instead of putting the simple issue, "is the plaintiff's allegation proved," the Judge took up a double issue and placed himself under the necessity of choosing between the plaintiff's story or the defendant's, he was held to have mistaken the principle of judicial determination which should guide him, as the question was quite independent of the truth or otherwise of the defendant's explanation, which might entirely fail, and the plaintiff's allegation might nevertheless be false.

Jackson, J.—THE plaintiffs in this case sued to recover from the defendants the sum of Rs. 1,358 as per khattas. Their allegation was that the defendants, for the purpose of conducting joint trade in miscellaneous articles, borrowed money from the plaintiffs on various dates between the 6th Pous 1276 and 21st Bysack 1277, at an interest of Rs. 1-12 per cent. per mensem ; that on the 8th Jyst 1278 defendants caused an account to be written in plaintiff's khatta through their gomastah Ram Soondur Chowdhry of the amount taken by them during the above period ; that the total was cast, and it was stipulated that interest should be paid at the above rate, and that the money would be re-paid in Kartick of the said year, and that they caused their names to be written on the top of the account, which they signed by mark.

The defendants entirely denied that they had taken any advance from plaintiffs. On the contrary they said that money was due to them from the plaintiffs. They denied having subscribed or accepted any settlement of account. They denied that Ram Soondur Chowdhry was their gomastah, and they stated in their written statement various other circumstances which according to them made the plaintiff's case wholly improbable.

The suit was tried before the Subordinate Judge of Dacca, and he, on a consideration of the evidence, found the claim of the plaintiffs to be disproved and groundless. He considered that the nature of the khatta was suspicious, that the leaf in which the hisab in the names of the defendants was entered appeared to have been rubbed by the hands in order to make it appear old, and that the marks of rubbing were still visible on it. He considered the witnesses to be vulgar people, who were associates of the plaintiffs and whose depositions were discrepant, and for other reasons which he gave he disbelieved the whole case for the plaintiffs and dismissed the suit. This judgment was appealed, and the District Judge Mr. Garrett passed his decision on the 19th December 1872, reversing that of the Subordinate Judge. Against that decision there was a special appeal to this Court, and the special appeal was heard on the 30th July 1873 before myself and the late Mr. Justice Mitter, and on that occasion we pointed out the errors which invalidated the judgment of the Lower Appellate Court and remanded the case for a new trial. On remand the Judge has again taken the case into consideration, and he has now again given judgment for the plaintiffs, with this exception that he has thrown out one of the sums claimed by them, *viz.*, the sum of Rs. 200, in respect of which he considers that the evidence is very weak and the plaintiffs are not entitled to a decree. In our previous judgment we directed the Judge's attention to what his duty was. We pointed out that the onus of proving their case lay upon the plaintiffs, and we laid down three specific issues for determination, firstly, whether there was any settlement of account as alleged by the plaintiffs ; secondly, whether

Digitized by Google

Ram Soondur had authority to bind the defendants; and thirdly, whether the further advances alleged to have been subsequently made by plaintiffs were proved. Now as to the further advances, the Judge resiles from his first conclusion, and holding the evidence to be very weak he has thrown out that part of the case. As to the authority of Ram Soondur, he says that decision on that point is unnecessary, inasmuch as it was proved that the defendants were actually present at the time when the account was signed by Ram Soondur. The sole issue, therefore, which remained was whether in point of fact, the account was settled with the assent and in the presence of the defendants. On that point the Judge reiterates his previous finding. Now if in coming to that conclusion the Judge had rested upon the evidence of the plaintiffs and intimated his belief of that evidence, the defendants would probably have had no grounds of special appeal, and we should be compelled to affirm that judgment how much soever we might have differed from the Judge's conclusion. But on reading over the judgment from beginning to end, we find not one single expression which indicates confidence in the plaintiff's case. The Judge adverts to the plaintiff's account book or khatta in which the alleged settlement of account is presented. If this account book had to be dealt with as corroborative evidence, it is clear that under Act II of 1855 it would have been inadmissible, because from the account given of it by the Judge it was clearly not kept in the ordinary course of business. It consisted of detached leaves stitched together without any sort of order and was not such as any Court could safely have received. It may be said that we do not deal with the exhibit as an account book, but as a book containing the admission of the defendants: therefore we must consider whether the plaintiffs proved their allegations in that respect. The Judge says:—"Admitting fully that the onus of proof is "on the plaintiffs and that the proof they "have given is not as satisfactory as it ought "to have been, there is one point in their "case which seems to me strongly to indicate "that this is a genuine claim. The plaintiff "sues the defendant (at least as regards part "of his claim) on an account stated between "them in the month of Jyst 1277. The "defendant replies this account is a fabri-"cation. 'In Assin or Kartick 1278, I "advanced the plaintiff Rs. 550 to prepare "silver ornaments. The plaintiff instead of "preparing any ornaments converted the "money to his own use. I pressed him for "the amount due and he has now got up "this case against me in Pous 1278, partly I "suppose to screen himself and partly at the "instigation of my enemy Warris Beparee." "But it is proved by two witnesses of the "plaintiffs, and it is not attempted to be "disproved by the defendant, that the account "on which the defendant is charged is in the "hand-writing of one Ram Soondur Chow-"dhry, and that this Ram Soondur left Dacca "for Calcutta in the end of Jyst 1277, and "died in Calcutta shortly after his arrival. "If therefore this account is in the hand-"writing of Ram Soondur Chowdhry, it is "impossible that it could have been possibly "written up to support a claim arising out of "quarrel which could not have arisen before "Assin or Kartick 1278. If therefore the "defendant takes upon himself to assert that "the account on which the plaintiff relies is "false, and that it was falsely prepared with "reference to a particular circumstance, and "it is demonstrated that the account could "not possibly have been prepared with "reference to that particular circumstance, "I think that the reasonable inference is "that the defendant's story is a falsehood. "No doubt it could not be properly said "that because defendant's story was proved "to be false, therefore the plaintiff's story "was proved to be true: still it appears to "me that if the plaintiff and his witnesses "give an account of a transaction and the "defendant gives another, and the defendant's "account is shown to be false, and as I am "compelled to come to some determination, "it seems reasonable that I should accept "the account given by the plaintiff." The next para. is very much to the same effect. It says:—"I do not conceive that this is "making the plaintiff's case on his adver-"sary's weakness in any objectionable sense. "The plaintiff no doubt has given sufficient "evidence, in quantity, to prove his case, "if that evidence is to be believed. The "Court is compelled to say whether that "evidence is credible or not, for it cannot "suspend its opinion; and as an argument "why I should believe that evidence, I am "shown that the defendant to account for "the existence of that evidence tells a story "which is palpably false, and this is, I think, "a good reason why I should believe the "story told by the plaintiff."

Here there are two distinct fallacies. The first is that the Judge, mistaking the principle of judicial determination which should guide him, has taken up a double

Digitized by Google

issue instead of a simple and single one. Instead of putting the issue, "is the plaintiff's allegation proved," he has placed himself under the necessity of choosing between the plaintiff's story and the defendant's. In fact in such a case as this, the defendant's story or explanation ought to have been put altogether aside. The second fallacy is where the Judge uses the expression "if the plaintiff and his witnesses "give an account of a transaction, and the "defendant gives another, and the defendant's "account is shown to be false, and as I am "compelled to come to some determination, "it seems reasonable that I should accept "the account given by the plaintiff." This is a misconception. The plaintiffs and their witnesses do not give one account of the transaction and the defendants another, but the plaintiffs and their witnesses allege a transaction which the defendants altogether deny. Whether the defendants' alleged explanation is true is a matter entirely beside the question. That explanation might entirely fail, yet the plaintiff's allegation might be, as the Subordinate Judge believed it, false. We may observe that the Subordinate Judge in dismissing the case does not advert to the affirmative case set up by the defendants. He confines himself to the plain issue whether the plaintiff's evidence is to be believed, and he concludes that he ought not. But the Judge, even in this second judgment after remand by this Court, has not addressed himself to the evidence of the plaintiffs, but has conceived it to be his duty to accept the plaintiff's story, because in his opinion the defendant's allegation is proved to be untrue. He adds one further consideration. He says :— "I may also remark that this account "receives some confirmation from the fact "that there is apparently some concealment "as to who was the defendant in the early "part of 1276. Hur Coomar Doss prepared "his accounts up to 1275, and Sreenath "prepared the khatta for 1276, but Sreenath "was not appointed till Chyet 1276, and who "was the gomastah from Bysack 1276 to "Chyet of that year, the period during "which most of these loans were taken?" Now the plaintiff's case was that Ram Soondur was the gomastah, and the question was not who was the gomastah from Bysack to Chyet 1276, but who was the gomastah likely to act on the defendant's behalf at the time the account was taken. The Judge does not find that Ram Soondur was the gomastah nor does he positively find that he was not. He only says that if Ram Soondur was not the gomastah the account could not be written by him. It is clear, therefore, that the Judge has not based his finding in favor of the plaintiffs upon the plaintiff's evidence, and inasmuch as the Judge's attention, and also that of the plaintiff's, was called to the necessity of basing a verdict upon that evidence, if it were possible to do so, it is evident the plaintiffs' evidence was not such as justified a decree in their favor. As this suit, therefore, was dismissed by the first Court, and as upon two separate trials before the Lower Appellate Court, the plaintiffs were not able to get a verdict upon some evidence of their own, we feel it our duty to restore the judgment of the Subordinate Judge, reverse that of the Judge, and dismiss the plaintiffs' suit with all costs.

The 2nd September 1874.

Present :

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Appellate Courts—Costs.

Case No. 130 of 1874.

Miscellaneous Appeal from an order passed by the Officiating Judge of Dacca, dated the 10th February 1874, *affirming an order of the Moonsiff of Moonsheegunge, dated the 21st November* 1873.

Kashee Chunder Dey (Judgment-debtor) *Appellant,*

versus

Bungshee Buddun Dey and others (Decree-holders) *Respondents.*

Mr. C. Jackson and *Baboo Bykuntnath Doss* for Appellant.

Baboos Chunder Madhub Ghose and *Huree Mohun Chuckerbutty* for Respondents.

An Appellate Court finally determining a suit is bound to decide by which of the parties before it the costs shall be borne ; it is not at liberty to declare that the costs shall be borne by the unsuccessful party in a suit to be hereafter brought.

Jackson, J.—THE appeal in this case is in a matter of execution and the order which it is sought to execute is an order as to costs contained in the judgment of the Additional Subordinate Judge of Dacca, dated the 23rd

Digitized by Google

March 1870. By that decree the Additional Subordinate Judge on appeal reversed the judgment of the Sudder Moonsiff of Dacca upon the ground that the suit which, but for the passing of Act XVI of 1868, would have been cognizable in the Court of the Sudder Ameen, which Court was abolished by that Act, ought to have been brought in the Court of the Moonsiff of Bohur. This decision of the Subordinate Judge was affirmed on special appeal by a Division Bench of this Court, and the decision is printed in XIV Weekly Reporter, p. 375. To the judgment so given was attached an order that the plaintiff was to be at liberty to institute a fresh suit in the proper Court within three months, and that the costs of that first suit and the appeal were to be paid by the party who should be unsuccessful in the suit so to be brought. The suit was afterwards brought and the result is that the plaintiff has got a decree, which decree has been in some respect modified by the final decision of this Court on special appeal delivered on the 7th July last. It is unnecessary to consider, therefore, the effect of the final decision of this Court upon the order in the first suit and the appeal, for this simple reason that we are of opinion that the order made by Mr. Wright, the Subordinate Judge, was made entirely without authority. It was his business as the Appellate Court on that occasion to determine that the costs should be borne by one or other of the parties before him as he was then finally determining the suit. He was not at liberty to declare that the costs of that suit should be borne by the unsuccessful party in a suit to be thereafter brought, because it might be that the suit would not be brought at all, and in that case there would be no execution, or the plaintiff and the defendant might be left to bear their own costs. But we think that the case is not one in which the plaintiff should have the costs of the previous proceedings, for our order was, as declared in the judgment of the 7th July, that each party should bear his own costs of all the proceedings throughout. If the suit was improperly brought, as we must hold it was, in the Moonsiff's Court at Dacca, it was the business of the plaintiff to see that it was transferred to the proper Court. He did not do so, and the defendant, therefore, ought not to pay the costs of a suit improperly brought in a wrong Court. The judgments of the Courts below in this case must be set aside. Under the circumstances, we make no order as to costs.

The 5th September 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Surety-bond—Liability of Sureties.

Case No. 1213 of 1874.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 13th March 1874, *reversing a decision of the Moonsiff of Huripal, dated the 29th November* 1873.

Raj Kristo Mookerjee (Plaintiff) *Appellant,*

versus

Issur Chunder Mookerjee and others (Defendants) *Respondents.*

Baboo Umbika Churn Banerjee for Appellant.

Baboo Bhyrub Chunder Banerjee for Respondents.

Where two parties executed a surety-bond addressed to J, R, and M, owners of certain property, binding themselves to be answerable for the good conduct and proper discharge of duties of their gomastah B, and the property was afterwards transferred to R alone, it was held that when J and M ceased to have any interest in the property, there was such entire change in the nature of the service that the sureties' liability did not continue, and they were not liable to be sued upon their bond.

Jackson, J.—THE plaintiff Raj Kristo Mookerjee sued three persons, Bissambhur Bhuttacharjee, Hara Chand Bhuttacharjee, and Kalee Doss Mookerjee, alleging that the first named defendant had taken service under him as a gomastah about 20 years before the suit at a time when he (Raj Kristo) was not the sole owner of the property, and that the other two defendants had executed a surety-bond addressed to Joy Kristo Mookerjee, Raj Kristo Mookerjee, and one Radha Mohun Banerjee, binding themselves to be answerable for good conduct and proper discharge of duties on the part of Bissambhur, and to make good any defalcations, and so forth. According to the plaint, the gomastah by reason of his failure to pay the amount due to him and to supply accounts was dismissed in Assar 1277, and on being required to give his nikas attended but afterwards disappeared. The plaintiff, there-

Digitized by Google

fore, brought this suit for the recovery of Rs. 240,—Rs. 190, as he alleged, for the balance of account, and Rs. 50 for the loazima papers.

Judgment was given by the Moonsiff for the amount sued for, but afterwards one Issur Chunder Mookerjee came in and setting himself up as the son of the defendant Kalee Doss, who is now dead, alleged that the summons had not been served on his father. The suit was therefore heard again, and the Moonsiff again gave judgment for the plaintiff, on which Issur Chunder alone appealed to the District Judge on the ground that the sureties having executed the bond to three persons, Joy Kristo, Raj Kristo, and Radha Mohun, were not bound when the property was afterwards transferred to Raj Kristo alone. The Judge considered this objection to be valid, and made the following order :—"On this ground "alone I hold that the surety-bond is of no "effect, and I set aside the order of the "Lower Court, and decree this appeal with "costs bearing interest at 6 per cent." But the decree of the Lower Appellate Court contains some words which do not appear in the judgment. They are that the মূল মোকদ্দমা or the original suit be dismissed.

On special appeal the plaintiff contends that the Judge was wrong in point of law in his decision as to the bond given by the surety-defendants, and also that even if he is right, the appeal ought to have been decreed only in favor of the defendant who appealed. On the first point we agree with the Lower Appellate Court. We think that when Joy Kristo and Radha Mohun ceased to have any interest in the property, and Raj Kristo claimed to be the sole owner, there was such entire change in the nature of the service that the sureties' liability did not continue, and consequently they were not liable to be sued upon this bond. As regards the defendant Issur Chunder, who is the respondent before us, this appeal must be dismissed with costs.

As to the other ground of appeal, that seems to be a matter which should rather have been brought before the District Judge, because the officer who drew the decree appears to have gone beyond the Judge's intention. It may be that the Judge did not intend to have given, under Section 337, the benefit of his decision under the surety-bond to the co-surety who had not appealed.

As regards the gomastah defendant, the case rests entirely upon different grounds. He was liable to answer quite irrespective of the surety-bond. There is no trace in the judgment of any intention to hold him free from the plaintiff's claim, and in fact he could not be so held so far as we can see. There is no doubt, therefore, that on application to the Judge he will amend his decree, and allow the decree of the Moonsiff to stand as regards the gomastah defendant.

The 19th November 1874.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Bond—Interest—Damages—Penalty.

On Appeal from the High Court of Judicature at Madras.

Vencatavarada Iyengar

versus

Venkata Luchmamal and another.

Defendant entered into a bond agreeing to pay a specified rate of interest in instalments on a sum borrowed, and to repay the principal in 12 years; the obligee not being bound to accept payment earlier. A zemindaree was mortgaged as security, and it was provided that if any obstacles were caused by the defendant in respect of any of the conditions of the bond, the mortgagee would be competent, after two months' notice, to sell the property, or portions thereof, and pay himself the principal and the interest thereon for the unexpired portion of the 12 years.

A portion of the interest having come into arrear, plaintiff gave notice of sale; but defendant disputed his right to sell on the alleged ground as not being an "obstruction" within the bond. The parties not being able to come to a final agreement as to the conditions of sale, plaintiff brought this suit claiming the full amount of the mortgage-money with interest for 12 years. He obtained a decree, which was modified by the High Court, who gave him principal and interest at the stipulated rate :

HELD, that the clause relating to sale was in the nature of a penalty, and plaintiff was not entitled to enforce it only upon default in the payment of interest.

HELD, that the suit was not maintainable, either as an action for damages for the amount which plaintiff could have obtained by the sale, or on the bond itself.

THE facts of this case material to its decision may be shortly stated. The defendant entered into a bond with the plaintiff on the 28th of December 1867, which is to this effect :—The defendant acknowledges that he had borrowed a sum of Rs. 60,000, which he agreed to pay. He says :—"As you "have this day paid, and I have received

Digitized by Google

"in cash, this sum of Rs 60,000, I "agree to pay interest thereon at three-"fourths per cent. per mensem, and to repay "the said principal sum in 12 years from "this date," but you, the plaintiff, are not bound to accept payment even though I tender it, nor can you demand it before that time. Then there is a provision for the payment of the interest which amounts to nine per cent. in three instalments annually, and then there is a mortgage of a certain zemindaree of Tiruvur for the purpose of securing the payment of the principal and interest of the bond. There are some further provisions to the effect that the mortgagor is to remain in possession, but that the mortgagee is entitled to retain some man on the premises to look after his interest, to be paid by the mortgagor. Then at the end there comes this clause :—"If any obstruction be "caused either by me or my men in respect "of any of the conditions aforesaid, you are "competent to give me two months' notice, "and if I do not within that term fulfil the "conditions entered into with you, to sell by "auction by yourself the said Muttah zemin-"daree and all other mortgaged property or "portions thereof, according to your "pleasure, to pay yourself at once the prin-"cipal due to you, and the interest payable "on the full amount of principal for the "unexpired portion of the 12 years, and "to deliver to me the remainder, if any." It appears that a portion of the interest became in arrear, and that the plaintiff gave notice in October 1869 of his intention to sell under this power, the plaintiff supposing that he had the power to sell for the purpose of realizing the principal and the interest up to the end of the 12 years. The defendant disputed this right of the plaintiff to sell for that amount on the mere ground of non-payment of interest, which he alleged not to be an obstruction within the meaning of the bond, and it appears that he took measures which stopped the sale, whereupon a further agreement was come to between the parties on the 26th October 1869, the material parts of which are to this effect:—At that time there was due the Rs. 60,000 and Rs. 5.426 for interest, and it was agreed that further interest was to be payable on the principal up to the date of payment. Then there is a further stipulation that the plaintiff is to deliver to the defendant all the mortgage documents and a certain note of hand given for Rs. 2,500 on account of interest, "that, together with interest "thereon, having been included in the "aforesaid amount of interest." Then it goes on to say :—"When as you," that is the mortgagee, "proceed to sell lot by lot, the "said amounts become fully covered up, you "shall not proceed with the sale of the sub-"sequent lots." It appears that conditions of sale were nearly agreed on between the parties when the plaintiff insisted upon a condition to the effect that if the sale of all the lots did not realize the full amount, then the sale of all those that had been sold before should be void, and there was also a dispute between them on the question of the defendant giving security to the plaintiff in the event of the sale not realizing the full amount of the principal and interest due. The sale did not take place ; whereupon the plaintiff brings this action. This plaint is drawn in a very obscure and ambiguous manner, and it is not very easy to arrive at the effect of it. One construction of it is that the plaintiff complains of an obstruction of his power of sale by the defendant, and claims as damages that which it would have realized by the sale if it had taken place, which he contends to be the whole amount of the mortgage-money, together with interest, up to the expiration of the 12 years. But it may also be taken as a suit brought under the bond, irrespective of the power of sale, for the purpose of recovering the full amount of the principal and interest for the whole time. The plaintiff obtained a decree in the Court below for all that he sued for. That decision was modified by the High Court, who thus expressed themselves :—"The pre-"sent suit can hardly be regarded as a suit "for damages occasioned by the obstruction "offered by the defendant to a sale under "the power. It appears rather to be founded "on the assumption that the plaintiff may "recover by suit and by process of execu-"tion whatever he might have deducted from "the proceeds of a sale made under the "power. But the deed itself does not contain "any such stipulation, and we do not think "it should be in such a case implied." Then they proceed to say that they modify the decree, and give to the plaintiff the principal sum and interest at the stipulated rate. From that decision the plaintiff appeals.

In their Lordships' opinion the decision of the first Court was clearly wrong. They are of opinion that this clause relating to sale was in the nature of a penalty, and that the defendant was not entitled to put up the property for sale, and to realize the full amount which he claims, namely, interest due up to the expiration of the 12 years,

Digitized by Google

upon such default only as has been made, namely, default in the payment of interest on the mortgage-money. What might or might not be an obstruction that would authorise such a proceeding it is not necessary to determine.

Assuming, then, the suit to be in the form of an action for damages, whereby the plaintiff seeks to recover the amount which he could have obtained by the sale, their Lordships are of opinion that it is not maintainable, and they also agree with the High Court that it is not maintainable on the bond itself, inasmuch as no such right of action, if not expressly given by the words of the bond, is to be implied from it. Their Lordships are therefore clearly of opinion that the decision of the first Court was wrong. Whether or not the plaintiff's suit ought to have been dismissed is a question not before them now, because the High Court have undertaken, and their Lordships are far from saying wrongly, on the matter coming before them, to do what they deemed just between the parties; and there is no appeal on the other side against the decision of the High Court. Their Lordships are therefore in the position of the High Court, and have to determine what is just between the parties; and they are of opinion that the decree of the High Court does determine this. In fact, towards the end of the case the contention very much narrowed itself. It was contended finally on the part of the appellant that he was entitled to somewhat more than the High Court had given him, on the ground that by the agreement of the 26th October there was a settlement of account under which he would have obtained some Rs. 426 more than the High Court gave him; and it would appear that the High Court have not given to the plaintiff two sums of Rs. 172 and 254 which he claims respectively as the wages of the man who was to be kept on the property to look after his interest and the interest due on the promissory note before mentioned for interest which was not paid. It would appear that the High Court have not given the plaintiff those sums, and he contends that he would be entitled to them if he could insist as he does upon this agreement of the 26th October 1869 being an account stated between the parties and an admission of the balance due at that time. But their Lordships have to observe, in the first place, that the plaint is not in any respect framed upon that agreement of the 26th October 1869, but is a plaint praying for principal and interest upon the bond; and it is only upon the hypothesis that it be treated as such a plaint that it is maintainable at all. And, further, it occurs to them to observe that if the High Court have inadvertently omitted to take notice of those items (and their Lordships are far from saying that is so), the proper course on the part of the plaintiff would have been to have called their attention to it by petition of review, or at all events in some other manner which has not been done. Their Lordships do not think the appeal maintainable on this latter ground.

Under these circumstances, their Lordships will humbly advise Her Majesty that the judgment of the High Court should be affirmed, and this appeal dismissed with costs.

The 3rd August 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Under-tenures—Adverse Possession—Ameen's Report—Second Inquiry.

Case No. 150 of 1873.

Regular Appeal from a decision passed by the Officiating Subordinate Judge of Moorshedabad, dated the 11th March 1873.

Nowab Syud Azim Ali Khan Bahadoor (Defendant) *Appellant,*

versus

Surussutty Debia and others (Plaintiffs) *Respondents.*

Baboo Hem Chunder Banerjee for Appellant.

Baboos Sreenath Doss and *Mohinee Mohun Roy* for Respondents.

Where a person who holds as ijaradar under one zemindar (A) has also some land under another zemindar (B), his possession of A's land cannot afterwards be pleaded as adverse to A, unless it was brought to A's

Digitized by Google

notice that there was a claim of adverse possession and that the ijaradar was holding adversely to him under some one else.

When an enquiry has been made by a Commissioner under the Code of Civil Procedure, the Court to which it is reported ought not, unless it annuls the proceedings of the first inquiry, order another on the same matter.

Jackson, J.—We have not thought it necessary in this case to call upon the vakeel for the respondents, because we are satisfied upon the evidence that the judgment of the Lower Court is correct. The plaintiffs claimed the land in dispute (the greater part of which has been since carried away by the action of the river) as a portion of their putnee mehal mouzah Soojapore Mondai, appertaining to chukla Dewanpore. They alleged that a portion of the land was washed away gradually by the current of the Ganges, that it afterwards reformed and returned to their possession, but that at the time of survey a dispute arose with the defendant, who, the plaintiffs alleged, in collusion with the ijaradar Mr. Lyons claimed a portion of the aforesaid putnee as appurtenant to his talook Dabeedaspore, and that, on the 16th March 1868, the thakbust Deputy Collector made an award against them. The present suit was, therefore, brought to get rid of the effect of that award and to get possession of 2,506 beegahs of land on declaration of their right thereto.

The principal defendant Nowab Syud Azim Ali Khan Bahadoor denied the plaintiffs' statements *in toto*, and alleged that the land in dispute, which contained within the boundaries given a greater quantity than is claimed in the plaint, belonged to his mouzah Dabeedaspore, which he said was a portion of turruf kismut Atapore, pergunnah Bahadoorpore in the district of Bhaugulpore. He maintained that this mehal had been for a long time in his possession, which fact had been affirmed by a decision of the Sessions Judge in 1849 under Act IV of 1840, and he therefore averred that the plaintiffs were not only out of Court in respect of title, but were also barred by limitation in consequence of 12 years' adverse possession.

The Subordinate Judge of Moorshedabad, who tried the case, ordered a local enquiry by an Ameen, who put in a report and map, and was also examined in Court. A change, however, took place in the office of the Subordinate Judge, and the gentleman who succeeded, apparently not satisfied with the result of the Ameen's enquiry, ordered a fresh investigation, the result of which is also on the record. Before the case came to a conclusion the previous Subordinate Judge resumed office, and he has now given judgment in favor of the plaintiffs, finding the land to be part of mouzah Soojapore Mondai, and finding the defendant's case to be entirely unproved.

On appeal the defendant's contention in the first place is that the plaintiffs' suit ought to have been dismissed on the ground of limitation. He also contends that there was not sufficient evidence to make out the plaintiffs' title to the land, and a third objection was made, which was not very much pressed at last, *viz.*, that as the greater portion of the land which the plaintiffs laid claim to had been carried away by the river before the suit had terminated, the decree ought not to have gone for the whole land. As to limitation the plaintiffs' case was that this land had been in their possession through their ijaradar Mr. Lyons, and it is proved incontrovertibly that Mr. Lyons had possession of the land and was also the plaintiffs' ijaradar, but it appears that Mr. Lyons, besides the mehal held under the plaintiffs, had also some land under the defendant. The defendant contended that it was in the capacity of his ijaradar that Mr. Lyons was in possession. In that state of the facts, it is clear that the plaintiffs could not be held barred by adverse possession, unless it was brought to their notice that there was a claim of adverse possession, and that Lyons was holding adversely to them for some one else and not as their under-tenant. It seems to be abundantly shown that they received rent from Lyons on account of this land. That being the case, we do not think they could be held to be barred. Then as to title the plaintiffs set up one state of facts as regards this land, and the defendant another. Each party adduced evidence in support of its own statement. It appears to us that that adduced by the plaintiffs far outweighs that on the defendant's side in respect of fulness, in respect of credit, and in respect of the means of knowledge. We think also that the arguments and inferences drawn by the Court below concerning the survey maps of 1848 and 1868 are well founded, and these maps can only be reconcileable with the state of the land on the hypothesis that the land belongs to the plaintiffs. There is an observation which we think ought to be made as to the enquiries by the Ameen. An objection to the first Ameen's enquiry

Digitized by Google

appears to have been preferred before the *ad interim* Subordinate Judge, and that officer passed an order to the effect that he doubted the correctness of that Ameen's enquiry. He therefore directed another Ameen to go and make further report. It seems to us that when an enquiry has been made by a commissioner under the provisions of the Code of Civil Procedure, the Court to which that enquiry is reported ought not, unless it absolutely quashes and annuls the proceedings of the first enquiry, order another enquiry on the same matter unless the subject-matter of enquiry by the second Ameen can be distinguished from the subject-matter of the first enquiry, in which case, of course, if there has been an omission and if the same Ameen cannot be deputed again, another officer might be employed. We think it is contrary to principle that the report and minutes of enquiry of the first investigation should remain upon the record as part of the record, and then there should be a second enquiry perhaps discrepant with the first. It appears to us that the Subordinate Judge who gave judgment had good reason for affirming and adopting the report of the first Ameen. His report is entirely in favor of the plaintiffs, and affords ample material to support the judgment of the Court below. As to the diluvion which has taken place since the suit began, it appears to us that that ought not to debar plaintiffs from obtaining the relief which they sought for in the plaint if, at the time of commencing the suit, there was land to the extent mentioned in the plaint unjustly withheld from them by the defendant, or as much of it as the evidence made out, because in the first place it would be necessary to find what amount of land had been improperly and unjustly withheld from them in order to the assessment of mesne profits, and in the next place, because that which the river had taken away might be restored, and it would be of the greatest importance to the plaintiffs to have a decision of the Court showing what they are entitled to. Of course in giving possession, the Court would not be able to give more than is found to be in existence, but that would not make the decision itself improper.

We think the appeal should be dismissed with costs.

The 2nd September 1874.

Present :

The Hon'ble L. S. Jackson and W. F. McDonell, *Judges.*

Benamee Execution—Objection—Judgment-debtors.

Case No. 187 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Nuddea, dated the 2nd April 1874.

Obhoy Churn Roy Chowdhry (Decree-holder) *Appellant,*

versus

Nobin Chunder Roy Chowdhry and another (Judgment-debtors) *Respondents.*

Baboo Rash Beharee Ghose for Appellant.

Baboo Gooroo Doss Banerjee for Respondents.

Judgment-debtors against whom execution is sought are competent to object that it cannot proceed benamee, the party interested being himself one of the judgment-debtors, whenever the fact comes to notice, and are not debarred, by having suffered execution at one instance, from setting up the objection when a further application is made.

Jackson, J.—This appeal proceeds upon three grounds. The first is that the objectors Nobin Chunder Roy and others, having allowed a previous execution at the suit of the party now applying to execute to pass unchallenged, ought not to be allowed now to take the objection which they have put forward, *viz.*, that the execution cannot proceed benamee, Ram Kishore being really the person interested who is himself one of the judgment-debtors. It seems to us that the judgment-debtors against whom execution is sought are competent to raise this objection whenever the fact comes to their notice,

Digitized by Google

and that they are not debarred, by having suffered execution at one instance, from setting it up when a further application is made. Assuming that Ram Kishore had himself become the owner of the interest in the decree, he purchased it in 1870 with full notice of what he was doing, because the judgment of the Full Bench in IX Weekly Reporter, page 230, by which it is declared that "one of several judgment-debtors who "purchases a decree against himself and his "co-debtors cannot issue execution against "his co-debtors and recover from them the "whole amount of the common debt," was given in February 1868, more than two years before he acquired this interest.

Then it is suggested, as the second point, that the judgment-debtor Nobin Chunder was in fact aware at the time of the previous execution that Ram Kishore was the party executing, and that he abstained from taking the objection so as to lull Ram Kishore into security, and so to allow the period of limitation to pass and debar Ram Kishore from suing his co-judgment-debtors for contribution. Now if the appellant before us could make out any such thing he would have a case of equity and good conscience which the Court might take into consideration, and might perhaps allow execution to proceed. But no case of that sort is made out.

Then, thirdly, remains the question of fact as to whether it is in truth shown that this purchase was made by Ram Kishore. On that point we are not inclined to differ entirely from the District Judge. It is quite clear, we think, upon the evidence that Ram Kishore was to some extent interested in the purchase. To what extent, that is to say, whether he made the whole purchase or purchased in equal share with Obhoy Churn, or whose share was more or less we are unable to say, but it seems clear that Ram Kishore had some interest. It is not improbable that he purchased the interest mainly for himself. In any case, there is no such evidence as to the actual precise extent of Obhoy's interest as that the Court should allow him to execute solely with reference to his own share, protecting the interests of the other judgment-debtors. That is not in fact the case made. The case made before the Court was that Obhoy alone was the party interested in the execution.

Under these circumstances, we think there is no ground for disturbing the order of the Lower Court and that this appeal must be dismissed with costs, Rs. 32.

The 15th September 1874.

Present:

The Hon'ble L. S. Jackson and W. F. McDonell, *Judges.*

Purchaser of Mortgagors' Rights—Notice of Foreclosure.

Case No. 1206 of 1874.

Special Appeal from a decision passed by the Officiating Judge of 24-Pergunnahs, dated the 14th April 1874, reversing a decision of the second Subordinate Judge of that district, dated the 15th July 1873.

Bhanoomutty Chowdrain (Plaintiff) *Appellant,*

versus

Prem Chand Neogy and another (Defendants) *Respondents.*

Baboos Mohinee Mohun Roy and *Nullit Chunder Sen* for Appellant.

Baboos Unnoda Pershad Banerjee, Mokesh Chunder Chowdhry, and *Sreenath Dass* for Respondents.

A purchaser of the mortgagor's interest whether he is in possession or not, is entitled to notice of foreclosure, except where any alienation of such interest has been prohibited by contract between the mortgagor and mortgagee; and a notice of foreclosure does not bind any purchaser who has not been served with it.

Jackson, J.—THE special appeal in this case raised a question of some difficulty and of great importance. We were asked to decide whether upon a mortgage in the English form relating to immoveable property situated in the moffussil and containing a power of sale, if the property were sold under that power and without reference to the Court, such sale could be supported as passing a valid title to the defendant. We were referred to the decision in the Sudder Dewanny Reports of 1847, page 354, Bhowanee Churn Mitter *v.* Joy Kishen Mitter, in which the Judges of that Court held that a person relying upon such sale could not eject a party holding under the mortgagor. On the other hand, we were referred to a decision of this Court by a Division Bench (Bayley and Hobhouse, JJ.) in which a contrary view was affirmed, although the question there arose incidentally upon a question of costs. We confess that if we were called upon to determine this

Digitized by Google

point, we should have felt considerable difficulty, but on calling upon the respondent's vakeel, he laid before us an entirely different point upon which he submitted the plaintiff's suit ought to be dismissed. On that point we have heard the argument of the special appellant, and the result is that in our opinion the objection thus referred to ought to prevail. It seems that the plaintiff relies upon a mortgage in the nature of a conditional sale, dated the 27th Bhadro 1271. That was a transaction between the owner of the property and one Tara Sunkur Roy Chowdhry, and it was stipulated that the amount advanced by him should be repaid on or before the 30th Srabun 1272. The payment was not made, and consequently it is said Tara Sunkur issued the notice of foreclosure on the 7th September 1865, and the notice was served on the owner Sham Dhun Roy Chowdhry. The defendant's case was that some years before the date of the transaction, that is, on the 10th of December 1862, Sham Dhun Roy Chowdhry borrowed Rs. 1,000 from one Mr. Cones and had executed the mortgage deed in the English form previously mentioned, and that under the power of sale contained in that deed, the property being sold by Messrs. Mackenzie, Lyall & Co., was purchased by the defendant on the 18th August 1865, that is to say, some 19 or 20 days before the plaintiff applied for foreclosure. This question appears to have been considered by the Subordinate Judge, who first tried the suit, but he was of opinion that the objection was not good. It was also raised before the District Judge on appeal, and the District Judge says :—"No authority has been offered in "support of the contention that appellant "as purchaser from the first mortgagee is "entitled to notice of foreclosure from the "second mortgagee. Possibly, looking at "appellant as assignee of the mortgagor's "interest in the property, he might be so "entitled, but that would only have given "him an equity of redemption, and I do not "understand that the appellant wishes to be "considered as assignee in any form whatever, and while I agree with the appellant "that if the Subordinate Judge thought it "material to the case that appellant should "prove his possession between March 1866 and "the date on which the sale to Tara Sunkur "Roy became absolute, an issue should have "been framed and opportunity for adducing "evidence on the point should have been "given. As the case now stands, it is "unnecessary for me to pass any orders on "this point or upon the appellant's objec"tion to the order for witnesses' expenses. "I am of opinion that the order of the "Subordinate Judge so far as it decrees the "4½ beegahs of kherajee land sued for to "the plaintiff ought to be reversed." So that the Judge threw out the suit on a different ground, *viz.*, the validity of the sale on the earlier mortgage deed.

Now the decisions upon the point which we have mentioned, and which is urged by the special respondent, are, one which was referred to at the original hearing, in the case of Gunga Gobind Mundul *v.* Bani Madhub Ghose, at page 172, Vol. III Bengal Law Reports.* In that case the judgment delivered by Mr. Justice Markby contains these words :— "It also appears to me to have been decided "by a great preponderance of authority in "this Court, although I admit that the deci"sions are not altogether reconcileable, that "a purchaser out and out of the mortgagor's "interest, whether by public or private sale, "and whether he be in possession or not, "must be served with notice except where "any alienation of the mortgagor's interests "has been prohibited by contract between "the mortgagor and mortgagee." The other case which is still stronger is in X Moore's Indian Appeal Cases. It is the case of Mohun Lall Sookool *v.* Goluck Chunder Dutt.† The passage in the judgment to which we refer is in page 14. Their Lordships say :—"It is quite clear upon the "authorities that if the sale had taken place "before the notice of foreclosure was filed, "that notice, to be effectual, must have been "served on the purchaser, and in the circum"stances above stated, their Lordships con"ceive that it ought to have been served upon "the decree-holder." Baboo Mohinee Mohun Roy for the special appellant contended that a purchaser to be entitled to the benefit of these rulings must show himself to be a true legal purchaser of the mortgagor's interest. It appears to us that that is a refinement which cannot be supported out of the rulings, for even if we suppose that the defendant would have a difficulty in making out that he had completely acquired the interest of the mortgagor, yet it cannot be denied that he had purchased an interest, and the interest which puported to have been conveyed to him was that of the mortgagor. In fact, it was a sale of the property out and out. Certainly it was the intention of the

* 11 W. R., 548.
† 1 W. R., P. C., 19.

Digitized by Google

rulings that a person so circumstanced should be entitled to notice, and that a notice of foreclosure shall not bind any purchaser who has not been served with it. The Subordinate Judge seems to think that it was necessary to prove possession under the purchase, but from the words used in III Bengal Law Reports and also in X Moore's Indian Appeal cases that does not appear to be the case. They show that the fact of the purchase alone would entitle the purchaser to notice. We cannot suspect, as alleged by the defendant in his written statement, that the plaintiff did know perfectly well that the defendant had made this purchase, but even if she did not (and it is not necessary to express any opinion on that point) the least diligence would have enabled her to know that that was the case and she ought to have then served notice on the purchaser. That being so, we think the plaintiff's suit might and should have been dismissed on that ground and that the special appeal ought to be dismissed with costs.

The 16th September 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Landlord and Tenant—Under-tenures—Possessory Suit—Evidence.

Case No. 1227 *of* 1874.

Special Appeal from a decision passed by the 1st Subordinate Judge of Twenty-four-Purgunnahs, dated the 8th April 1874, *reversing a decision of the Moonsiff of Sealdah, dated the 7th August* 1873.

Chunder Monee Dassee and others (Plaintiffs) *Appellants,*

versus

Issur Chunder Ghose (one of the Defendants) *Respondent.*

Baboos Hem Chunder Banerjee and *Bama Churn Banerjee* for Appellants.

Baboos Sreenath Banerjee and *Umbika Churn Bose* for Respondent.

Plaintiffs' case was that they, with other members of a joint Hindoo family, had long been in receipt of rent for an ancestral jote from a korfa tenant whom they sued for rent, when defendant successfully intervened as purchaser of the rights of the superior landlord of the plaintiffs, seeking thus and in other ways to oust plaintiffs from their tenure. Plaintiffs sued accordingly for declaration of title and possession. The Moonsiff decreed the case; but the Subordinate Judge threw out the claim on the ground that plaintiffs had not shown their specific possession of the land by under-letting to the korfa tenant:

HELD, that there was a substantial error of law in the Lower Appellate Court's method of investigation, as plaintiffs were at liberty to prove their case quite as much by the fact that the landlord had received rent from them, as by the circumstance that they had received rent from the korfa tenant.

Jackson, J.—WE are of opinion that the decision of the Lower Appellate Court discloses a substantial error in law in the investigation of the case, which may have produced error in the decision on the merits. It is easy to perceive a good deal of mismanagement of this case in the Court of first instance. The plaintiffs' case was that they, along with other members of a joint Hindoo family, originally represented by three brothers, Kripa Ram Ghose, Nyan Ghose, and Doolal Ghose, had been for many years and through several generations in enjoyment of an ancestral jote, which jote they enjoyed amongst other things by receipt of rent from a certain korfa tenant Oozeer Mollah; that they had brought a suit against this Oozeer Mollah to recover rent from him, in which the defendant Issur Ghose, who is one of the members of the family, intervened and with success. This Issur Ghose, it appears, has bought the rights of the superior landlord of the plaintiffs, and by this intervention and in other ways seeks to oust plaintiffs from their tenure. The Moonsiff held that the plaintiffs had made out their case, but the Subordinate Judge in what appears to us to be too restricted a view of the case has reversed that judgment and dismissed the plaintiffs' suit. The Subordinate Judge says:—"It will be "seen from the plaint that the allegation of "the plaintiffs is that they specifically held "their share in each of the three plots "comprised in the tenure; that they let out "their share in two of the plots to the korfa "tenant Oozeer Mollah; that they sued the "latter for rent, but their suit has been "dismissed on account of the opposition of "the defendant Issur Chunder; they there-"fore come for declaration of title and for "possession in 3 beegahs of the lands. The "defendant Oozeer Mollah denied the rela-"tionship of landlord and tenant in the rent "suit, and he still denies the said relationship "in the present suit. I am of opinion that "the onus of proof lies on the plaintiffs. "They must show their specific possession

Digitized by Google

"of the lands by under-letting to the korfa "tenant. There is no proof whatever on "the subject. This is sufficient for throwing "out the present claim." There runs throughout the judgment the manifest error that plaintiffs were bound to make out their possession by under-letting to Oozeer Mollah as if the present controversy was between the plaintiffs and Oozeer Mollah. The present suit is really and essentially against Issur Chunder Ghose, and this fact affects materially the view to be taken of the evidence. The Subordinate Judge puts entirely out of sight that evidence upon which the Moonsiff laid, and we think properly laid, very considerable stress, *viz.*, the evidence of the previous landlords. In a case like this, of course, the plaintiffs were at liberty to prove their case quite as much by the fact that the landlord had received rent from them, as by the circumstance that they themselves had received rent from Oozeer Mollah, and the evidence of the predecessors of Issur Ghose on that point is very strong. It goes to show, and there seems to be no reason for discrediting it, that the vendors of Issur Chunder had themselves received rent for several years from these plaintiffs, and that they saw that their predecessors in title had also received such rents, and the fact that the plaintiffs had paid rent jointly with Issur Chunder is a circumstance which goes a great deal in their favor. Our attention was drawn to the 109th Section of the Evidence Act from which it is clear that when the relation of landlord and tenant is shown to have subsisted between the plaintiffs and the parties under whom Issur Chunder claims, it was for Issur Chunder to show conclusively how and when that relationship ceased. We are not sure that if the Subordinate Judge's attention had been drawn to this mode of investigation, his judgment would not have been different from what it is. The judgment goes on :— "If the establishment of the mourosee "character of the tenure be the true object "of the suit there is no evidence on the side "of the plaintiffs to prove such a character." It then goes on to enlarge on the evidence in that part of the case. Now it is clear that the object of the suit was not to establish the mourosee character of the tenure. That is a question which may arise at a later period—supposing plaintiffs to be replaced in possession of the tenure or a share of it—between themselves and the superior landlord. It is not necessary for the purposes of the present suit to determine whether the tenure is mourosee or what its present character may be, so long as it is a subsisting valid tenure.

We think, therefore, that the case must go back to the Lower Appellate Court for a fresh decision on the principles stated. The costs of this appeal will follow the result.

The 20th November 1874.

Present :

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Redemption Suit—Limitation—Act XIV of 1859 s. 5.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Juggernath Sahoo and others

versus

Syud Shah Mahomed Hossein and others.

The period of 60 years within which the law allows mortgagors to bring their suit cannot be diminished by any Court of justice, on the ground of the laches of a party in the prosecution of his rights.

Following a previous ruling of the Privy Council (in the case of Radhanath Doss *v.* Gisborne & Co.), it was held that in a suit founded upon a right to redeem, the defendant, in order to claim the benefit of Act XIV of 1859 s. 5, must show three things : first, that he is the purchaser according to the proper meaning of that term ; second, that he is a *bonâ fide* purchaser ; and third, that he is a purchaser for valuable consideration.

THIS is a suit by the heirs and representatives of a Mahomedan lady named Bibee Mujo, to recover possession of property comprised in a zur-i-peshgee lease from the defendants, who claim to be purchasers for value of the property in dispute. The title of the plaintiffs is, in fact, founded upon a right to redeem, although the suit is not exactly in the form of an ordinary redemption suit.

The title of the plaintiffs is thus derived. Some time in the year 1814 one Khadim Hossein mortgaged the whole of the mouzahs, of which a share is claimed in this suit, by a zur-i-peshgee lease to one Sheik Emam Buksh. The zur-i-peshgee was for seven years, and stipulated that out of the gross proceeds of the village five annas should be paid as huk-ajiree to the mortgagors, and the remainder be retained by the mortgagees ;

---

* From the judgment of J. P. Norman, Offg. C.J., and L. S. Jackson and W. Ainslie, JJ., in Regular Appeal No. 32 of 1870, decided on the 13th March 1871.

Digitized by Google

the amount thus coming to the mortgagees to be received by them in lieu of interest. Khadim Hossein died, and a dispute afterwards arose among his heirs, or persons claiming to be his heirs, which was finally settled by a compromise, in the year 1817. Under that arrangement, his wife, Bibee Emamun, became entitled to seven and a half annas of his interest in the mortgaged property, Bibee Mujo became entitled to four and a half annas, and Amjed Hossein, the nearest male relation, to four annas. After that, though it does not appear very distinctly at what time, an arrangement is admitted to have been made, by which, as between the mortgagors and the mortgagees, the original mortgage was treated as three distinct mortgages, in the proportions in which the estate of Khadim Hossein had been divided under the compromise abovementioned. The result was that Bibee Mujo became solely entitled to the equity of redemption in four and a half annas of the mortgaged property, upon the payment of a similar proportion of the original mortgage debt.

It is admitted that Amjed Hossein unquestionably sold the equity of redemption in his four annas to the persons through whom the appellants derive their title. The share of Bibee Emamun seems to have been redeemed by her, or by her representatives, as early as the year 1844, upon a suggestion that the whole of the mortgage debt for which she was liable had been satisfied by the retention of the huk-ajiree coming to her, or in some other manner. But the contention on the part of the plaintiffs in this suit, the respondents on the present appeal, is, that the equity of redemption as to her share remained in Bibee Mujo, and that, by reason of the retention of the huk-ajiree due and owing to her, the whole of her share of the mortgage debt has been satisfied, and that, therefore, her representatives are entitled to recover possession of her share of the mouzahs in question with six years' mesne profits.

The title set up by the defendants is as follows:—The original mortgagees sold their interest to Sheikh Taleb Ally and his two sons, Sheikh Fuzul Ali and Sheikh Ashghur Ali. They thus became the mortgagees. Sheikh Taleb Ali died, and his interest descended to his two sons. It is alleged on the part of the defendants that Bibee Mujo, in the year 1841, sold her interest in the four and a half annas upon terms similar to those upon which Amjed Hossein had sold his interest in his four annas to Sheikh Fuzul Ali and Sheikh Ashghur Ali; and that by subsequent purchases and conveyances, the absolute interest which had thus been acquired by Sheikh Fuzul Ali and Sheikh Ashghur Ali in the four and a half annas share of the mouzahs, which is the subject of this suit, had become vested in some one or more of the appellants as purchasers for value, and without notice.

A point which has been taken as to a moiety of the property in dispute makes it necessary to state with some precision what was the devolution of title as to that moiety. The whole interest, whether absolute or merely by way of mortgage, which was vested in Fuzul Ali and Ashghur Ali, was divided between them in equal moieties. And it is alleged that on the 29th of July 1844 Fuzul Ali transferred his interest to his wife by a buimoknsa, or conveyance of property, in satisfaction of her rights of dower; that this wife, whose name was Bibee Zenut, exercised rights of ownership over the property, having mortgaged it on the 8th of December 1849, and that on the 10th of January 1859, *i.e.* within 12 years before the institution of the suit, she transferred her absolute interest in the property to the two first appellants on the record. Of the other moiety of the property, being that which was vested in Sheikh Ashghur Ali, it is only necessary to say that by various conveyances the whole of it, with the exception of the small portion afterwards mentioned, had, before the year 1860, become vested in the principal appellants, being the first and second on the record. That small portion, having been purchased at an execution sale by a Mahomedan lady, afterwards became vested in the appellant Burra Toonissa.

From this statement of the title set up by the defendants, it is obvious that the material question to be determined in the cause was the validity of the alleged conveyance of the equity of redemption by Bibee Mujo to Ashghur Ali and Fuzul Ali. Against the validity of that instrument, we have the decision of the two Indian Courts, both concurring in finding that, if not a fabrication, as it was found by the Judge of first instance to be, it cannot be treated as established against Bibee Mujo or her representatives.

The first consideration upon that point is whether sufficient grounds have been presented before their Lordships to induce them to deviate from their general rule, not to disturb such a finding of fact by two Courts

Digitized by Google

in India. If they are to look merely at the evidence of the execution of that conveyance, they are bound to say that, so far from thinking that there is any ground for an exception being made to the general rule, they are of opinion that upon that evidence the conclusion of the High Court would be correct. To fix Bibee Mujo with the deed, it is necessary to establish the mooktearnamah, and the evidence of the execution of that instrument by her is of the slightest and most unsatisfactory character. The evidence, again, of the execution of the deed, as it is stated to have been executed by the mooktear appointed by the mooktearnamah, and of the subsequent admission of the deed by the lady, is also of a very suspicious character. It appears, moreover, that the deed was not registered even before the Cazee for several months; and that it was not registered at all, as the conveyance by Amjed Hossein had been, in the office of the Registrar of deeds. It appears further that in 1843, upon an application made to the Collector by Fuzul Ali and Ashghur Ali for mutation of names, on the suggestion of such a conveyance having been executed by Bibee Mujo, a petition of objections disputing such execution, was filed by that lady's agent, and that the applicants Fuzul Ali and Ashghur Ali thereupon allowed their proceeding to drop.

The only doubt which their Lordships have felt on this part of the case has been founded on the laches of Bibee Mujo and her representatives in taking steps to enforce their rights as mortgagors for so many years; and if there had been a substantial conflict of evidence touching the execution of the deed, their Lordships might have thought that the Courts in India, in weighing that conflicting evidence, had hardly given sufficient weight to the inferences which arise from such laches. But their laches cannot estop the parties from asserting their right, if it exists. The question is one of title, and the right to assert that title is to be determined by the law of limitation as it stands. The law, wisely or unwisely, has given to mortgagors the long period of 60 years within which to bring their suit; and no Court of justice would be justified in diminishing that period on the ground of the laches of a party in the prosecution of his rights. Their Lordships, after weighing the whole of the evidence, and giving full effect to the laches of the parties, cannot say that the execution of this deed by Bibee Mujo has been proved. They must, therefore, deal with the case on the assumption that the two Courts below were right in finding that material link in the title of the defendants to be wanting.

If that be so, it remains to be considered whether Mr. Doyne's argument as to the Statute of Limitations can prevail. He has not attempted to show that the Courts below were wrong, in fact it could not be shown that the Courts below were wrong, in finding that the suit as a whole was not barred by the Statute of Limitations. It follows that the plaintiffs (the respondents) can assert a title to redeem the portion of the property which fell to Ashghur Ali, since, if the conveyance of the equity of redemption to him is not established, he had nothing but a mortgage title to convey; and there was no conveyance even of that to the appellants, except within the period of 12 years. The questions raised by Mr. Doyne are, whether a different rule ought not to be applied to that portion of the property which was vested in Fuzul Ali, and which passed by the baimokasa to his wife, and from her to the appellants, the transfer to the wife having occurred more than 12 years before the suit; and whether the suit as to this portion is not barred by the 5th Section of Act XIV of 1859. Upon that point their Lordships, during the argument, entertained some doubt; but they are of opinion that they can make no distinction between the two classes of property, for the following reasons:—In the first place, the case which has been made here does not really appear to have been made in either of the Courts below. It certainly was not made in the Court of first instance; and though it was said that it was raised by the grounds of appeal, it appears to their Lordships that the first ground of appeal points to a general bar of the whole suit; and the observations of the learned Judges of the High Court in giving their judgment show that the argument before them must have proceeded upon that ground. Moreover, upon the merits of the question, their Lordships are of opinion that the supposed bar to the suit is not established. In the case of Radhanath Doss *v.* Gisborne & Co.,* in which the judgment was given by the present Lord Chancellor, the principles upon which the 5th Section of Act XIV of 1859 is to be applied to such cases as the present are very clearly stated. His Lordship said:—"But their Lordships cannot fail to observe

* 51 W. R., P. C., 24.

Digitized by Google

"that the provisions of this Section are of "an extremely stringent kind. They take "away and cut down the title which *ex* "*hypothesi* is a good title, of the *cestui que* "trust or of a person who has deposited, "pawned, or mortgaged, property. They cut "down that title in regard to the number "of years that the person would have had "a right to assert it; from a very great "length of time, sixty years, they cut it "down to twelve years. It is, there- "fore, only proper that any person claiming "the benefit of this Section should clearly "and distinctly show that he fills the posi- "tion of the person contemplated by this "Section as the person who ought to be "protected. Their Lordships think that, in "order to claim the benefit of this Section, "the defendant must show three things: "first, that he is the purchaser according to "the proper meaning of that term; second, "that he is a *bonâ fide* purchaser; and "third, that he is a purchaser for valuable "consideration." Now if the twelve years to be computed under the 5th Section are to run from the transfer by the baimokasa to Bibee Zenut, it is necessary to show that Bibee Zenut was a *bonâ fide* purchaser, and of that there is no proof; on the contrary, the transaction is open to all the suspicions which attach to transactions between a Mahomedan and his wife, and the necessity of proving that the purchaser is a *bonâ fide* purchaser makes the absence of a particular plea raising the particular defence now set up extremely material, because if that point had been distinctly raised in the Courts below, it would have been open for the plaintiffs to dispute the *bona fides* of that transaction, and to have it investigated.

It seems, therefore, to their Lordships, that they cannot give any greater effect to the transfer of the share of Fuzul Ali than they do to that of the share of Ashghur Ali.

There is, however, one point upon which their Lordships are not satisfied with the present decree. They cannot but remark that the laches of the plaintiffs in the case have been very great, and that the case is far from being a clear one. They have also to remark that there are no grounds for imputing to the appellants, the actual holders of the property, a knowledge of any fraud that there may have been in the supposed transfer to their vendors. They have also to remark, that, in strictness, some exception might have been taken to the form of the suit considered as a redemption suit, although it is admitted at the bar that there are no grounds for a further investigation of the question whether the mortgage money had been paid off at the date of the suit; and that it may be considered to have been paid off. Their Lordships, however, cannot see that there were sufficient grounds for allowing the plaintiffs, who have been guilty of such laches, to recover, as against purchasers for valuable consideration, without notice of their title, mesne profits from any date earlier than that of the institution of the suit. They think that, on the institution of the suit, the laches of the plaintiffs in enforcing their rights ceased, and that the mesne profits from that date should follow the result.

Their Lordships will, therefore, humbly advise Her Majesty to confirm the decree under appeal, with the exception that the amount of mesne profits should be reduced to the mesne profits which have been received since the institution of the suit. The appellants having, to the extent of a reduction in the mesne profits, succeeded on the appeal, and the respondents not having put in a case or appeared at the bar, their Lordships will make no order as to the costs of this appeal.

The 25th November 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Rent Suit—Notice of Relinquishment.

Case No. 1199 of 1874.

Special Appeal from a decision passed by the Officiating Additional Judge of Jessore, dated the 20th March 1874, reversing a decision of the Additional Sudder Moonsiff of that district, dated the 16th July 1873.

Suroop Chunder Mitter and another (Plaintiffs) *Appellants,*

versus

Dhonaye Biswas (Defendant) *Respondent.*

Baboo Ashootosh Dhur for Appellants.

Mr. H. E. Mendies for Respondent.

Digitized by Google

A suit for enhancement of rent is rightly brought against a registered tenant, although the latter has conveyed away his interest in the land, if he has not given a regular notice of relinquishment to the zemindar.

Jackson. J.—THE decision of the Lower Appellate Court in this case is not warranted by the pleadings and facts of the case. The Additional Judge has thrown out the suit on this ground that "the notice of enhance-"ment is based on ground laid down in the "Section 18 of Act VIII of 1869, while "plaintiff ought to have proceeded under "Section 51 of Regulation VIII of 1793 as "the defendant is the holder of an interme-"diate tenure." Now on looking at the written statement of the defendant, we find that not in one passage, but in several passages, not less than four or five, he speaks of the tenure as being a jumma and refers to the prevailing rates of rent paid by the same class of ryots for lands of similar description and with similar advantages in the places adjacent, and enters into a discussion of what those rates are. The statements in the written statement are quite inconsistent with the ground afterwards taken that the holding was an intermediate tenure. We think that the suit was improperly thrown out and that the judgment of the Moonsiff ought to stand.

Mr. Mendies appears for the respondent, and proposes to take an objection to the effect that the suit has been improperly brought against his client on account of his having previously conveyed his interest in the land to some one else, *viz.*, one Abdool. We think this objection ought to have been framed in writing, and a copy of it delivered to the special appellant according to the practice of the Court, but that has not been done. On looking at the papers and hearing what Mr. Mendies had to say, it appears that no regular notice of relinquishment was ever given to the zemindar. No doubt, some allegation of the kind was made in a previous suit, but that is not the sort of notice which it is necessary to give, and we think the Moonsiff is right in holding that the zemindar was justified in bringing the suit against the registered tenant. Besides, it is not the whole jumma but apparently a portion of it that is transferred. The judgment of the Lower Appellate Court must be reversed, and that of the Moonsiff restored with costs.

The 7th December 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Will—Probate.

Case No. 227 of 1874.

Miscellaneous Appeal from an order passed by the Officiating Judge of Chittagong, dated the 27th May 1874.

Shustee Churn Patuck (Petitioner) *Appellant.*

Baboo Aukhil Chunder Sen for Appellant.

Where an application for probate was unopposed, although a notice in the nature of a citation had been issued to the testator's widow, the Judge was held not to have been justified in rejecting the application merely upon internal evidence contained in the will.

Markby, J.—IT appears to us upon the facts as they are stated on this record that the District Judge was wrong in refusing to grant a probate in this case. A notice in the nature of a citation had been very properly issued to the widow, who was a person strongly interested in opposing this will, and she took no steps in opposing the grant of the probate. It seems to us, therefore, that it is not sufficient to reject this application, as the Judge apparently does, upon any internal evidence contained in the will itself. The application being unopposed, we think there is nothing in the circumstances of this case which would justify the refusal of probate. The grant of probate would not prevent any future application for its withdrawal, if it should hereafter turn out that there is reason to suppose that it was wrongly granted. We also think that we ought to point out that the provisions of the Act as to grant of probates will be rendered almost useless, if so long a time is allowed to elapse before the final order is made on an application of this kind. The application for probate was made on the 5th March, and although there was no opposition, no final order was made until the 27th May; in the meantime the estate was left wholly unprotected.

The appeal is decreed, and the probate is ordered to be granted to the applicant.

Digitized by Google

The 14th December 1874.

Present :

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Co-sharers—Act XI of 1859 *ss.* 11 *&* 12—*Declaratory Decree.*

Case No. 914 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 9th February 1874, *reversing a decision of the Additional Moonsiff of that district, dated the 30th August* 1873.

Goluck Chunder and another (Plaintiffs) *Appellants,*

versus

Ram Huree (one of the Defendants) *Respondent.*

Mr. M. L. Sandel for Appellants.

Baboo Bhyrub Chunder Doss for Respondent.

In a suit for a declaration of plaintiff's title, on the allegation that defendant, one of the sharers with him in a joint estate, had been recorded under Act XI of 1859 s. 11, separately in respect of a larger share than that to which he was entitled, it was pleaded that the suit should not lie, because plaintiff had not appeared before the Collector and objected to defendant's being registered:

HELD that, by such omission, plaintiff had not forfeited his right to the share of which he was in possession, and that the suit was one in which it would be proper to make a declaratory decree.

Markby, J.—WITH regard to the first point whether this was a suit in which a declaratory decree ought to be made, we think that it was a case in which it was proper to make such a decree. The allegation of the plaintiff was that the defendant, one of the sharers with the plaintiff in a joint estate, had been recorded under Section 11, Act XI of 1859, separately in respect of a larger share than that to which he was entitled. Section 12 shows that that is a matter proper for the determination of the Civil Court ; and the only reason therefore that could be alleged why this suit should not lie is that the plaintiff had not appeared before the Collector and objected to what he did. We cannot say that merely by that omission he has forfeited his right to the share which he claims and of which he is in possession. Nor can we say that it would be safe for the plaintiff to allow that separate record to continue without having his title declared.

Then with regard to the other objection, namely, that contained in the first ground of special appeal, we think that the Subordinate Judge has taken a wrong view of this case. It appears that the plaintiff came into Court alleging that he could not produce his title deed which was the origin of his interest in the property, because as he stated the title deed was destroyed. But nevertheless he asked the Court to declare that he was the owner of the property. It is clear, therefore, that the main question for determination was whether the plaintiff had been in possession of this property for such a considerable time as to give rise to a fair presumption in his favor that he was the owner of the property as he stated. It was no doubt most important for him to prove, if he possibly could, what exactly had become of his title deed. Nevertheless the real question must be whether or no he had been in possession of the property so as to give rise to the presumption that he was the owner. Notwithstanding that the Subordinate Judge really seems hardly to have disposed of the question of possession at all, which was the main question to be disposed of in the appeal.

The judgment of the Lower Appellate Court must, therefore, be set aside, and the appeal remanded to be reheard generally except on the question of limitation. We think that the question of limitation does not arise as a separate issue, because, as we have already said, the plaintiff will have to prove not only his possession within 12 years before suit, but a possession for such a length of time, and under such circumstances, as to give rise to a presumption of title in his favor.

Costs will abide the result.

Digitized by Google

The 16th December 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Arbitration—Interest—Act VIII of 1859 *s.* 325 *—Act XXIII of* 1861 *s.* 10.

Case No. 240 of 1873.

Regular Appeal from a decision passed by the Subordinate Judge of Rungpore, dated the 28*th May* 1873.

Mohun Lall Shaha and others (some of the Defendants) *Appellants,*

versus

Joy Narain Shaha Chowdhry (Plaintiff) *Respondent.*

Baboos Sreenath Doss and *Gopal Lall Mitter* for Appellants.

Mr. R. T. Allan and *Baboos Mohinee Mohun Roy* and *Golap Chunder Sircar* for Respondent.

A Court has no discretion to deal judicially with the merits of a case determined by arbitrators, but is bound to pass judgment according to their award. Accordingly it cannot decree interest which the arbitrators have not awarded.

Phear, J.—We think that in this case the question as to interest was part of the matter in difference between the parties which was submitted to the arbitrators. And it is plain that the arbitrators most effectually determined this question between the parties by omitting to direct that the defendants should pay, in addition to Rs. 18,000 odd, any interest thereon. This being so, upon the award coming up to the Court under the provisions of Act VIII of 1859, the Court did not see cause to remit the award or any part of the matters referred to the arbitration for re-consideration to the arbitrators; and no application was made to set aside the award. Accordingly under Section 325 of the Civil Procedure Code the Court was bound to pass judgment according to the award. And upon the judgment so passed, the decree itself necessarily followed. That decree, therefore, ought not to have contained any order for the payment of interest.

But it is said that Section 10 Act XXIII of 1861 gives the Court power independently of the arbitration proceedings to award interest. The words of that Section are:—

"When the suit is for a sum of money "due to the plaintiff, the Court may, in the "decree, order interest at such rate as the "Court may think proper to be paid on the "principal sum adjudged from the date of "suit to the date of the decree, in addition "to any interest adjudged on such principal "sum for any period prior to the date of "suit; with further interest on the aggregate "sum so adjudged and on the costs of the "suit from the date of the decree to the date "of payment."

But it seems to be very plain that this Section only applies to those cases in which the Court is called upon to decide a matter judicially between parties. It can only exercise judicial discretion when it has the merits of the case brought judicially under its notice. In the present instance it had no discretion to deal judicially with the merits of the case between the parties. Section 325 bound the Court to take the merits as they were determined by the arbitrators, and to pass a decree accordingly. Part of those merits, as has already been mentioned, concerned the payment of interest. And the Court could not go beyond the award of the arbitrators in this particular matter any more than it could in any other portion of the award.

We think that the appeal must be upheld. And the decree passed on the award must be varied by the omission of the sum allowed for interest.

The appellants must have their costs in this Court.

Digitized by Google

The 19th December 1874.

Present :

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Sale for Arrears of Rent—Transfer of Tenure—Registry in Zemindar's Books.

Case No. 726 of 1873.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 31st December 1873, affirming a decision of the Additional Subordinate Judge of that district, dated the 20th May 1873.

Ram Kishore Acharjee Chowdhry and others (some of the Defendants) *Appellants,*

versus

Krishno Monee Debia and others (Plaintiffs) *Respondents.*

Baboos Doorga Mohun Dass and *Kishen Doyal Roy* for Appellants.

Baboos Kalee Mohun Doss and *Issur Chunder Chuckerbutty* for Respondents.

A tenant cannot by merely alienating his tenure deprive the zemindar of the right which he would otherwise have to sell it in execution of a decree for arrears of rent. A zemindar can sell the tenure in the hands of the transferree, not being one of the judgment-debtors, if he does so with reasonable promptness: provided he has not done any thing to recognize the transfer.

Where a zemindar makes a transferree a party to a suit for rent and accepts a decree against him jointly with other persons, he must be held to have recognized the transferree as a tenant, although the latter's name may not have been entered as such in the zemindar's books.

Phear, J.—THE plaintiffs in this case are the talookdars of a certain talook Newaz; and in their talook is an under-tenure chuck kismut Silashi which is the subject of the present suit, and which was in the year 1856 held under the plaintiffs by one Ram Nath Pal. In that year the talookdars obtained a decree against Ram Nath Pal in the Collector's Court for arrears of rent of this tenure for the year 1262. Five years afterwards, namely, on the 12th July 1861, the present plaintiffs put up the tenure for sale in execution of the decree of 1856, and at that sale bought the chuck themselves. This suit is brought by them to recover possession of the chuck on the strength of the title obtained by this purchase against several defendants, namely, the 1st defendant Mr. Wise, the 2nd, 3rd, 4th, and 5th defendants, respresentatives of one Dinobundhoo Bundopadhya, and the 6th and the following defendants, representatives of the Ram Nath Pal above-mentioned.

It appears that in the interval between the decree of 1856 and the sale of the tenure in execution of it in July 1861, Dinobundhoo Bundopadhya purchased this tenure by a private sale from Ram Nath Pal or Ram Nath Pal's representatives. This was in the year 1859. In the following year, the plaintiffs brought a suit against the representatives of Ram Nath Pal for arrears of rent of the same tenure in respect of the years 1259, 1260, 1261, 1262, 1263, 1264, and 1265. The Pals in answer to this suit, at any rate to a part of it, set up the alienation of the previous year to Dinobundhoo Bundopadhya, and under protest, as we are told, the plaintiffs then made Dinobundhoo Bundopadhya a party to that suit, and eventually got a decree against him jointly with the Pals for arrears of rent for the years just mentioned to the amount of Rs. 138-11.

In the present suit, the 1st defendant and the representatives of Dinobundhoo Bundopadhya resist the claim of the plaintiffs to recover the tenure on the footing of the execution sale of July 1861, because they say that at that time not only was the tenure actually transferred to a party other than those who were the judgment-debtors in the decree of 1856, namely, to Dinobundhoo Bundopadhya for Mr. Wise, but that the plaintiffs themselves had recognized Dinobundhoo Bundopadhya, the transferree, as a person liable for the rent of that tenure.

From this short statement of the case, it appears that two questions of some importance arise between the parties. The suit is in fact a suit to obtain specific performance of the contract of sale effected on the 12th July 1861. And it is apparent that the plaintiffs do not very satisfactorily, to say

Digitized by Google

the least of it, show that they have paid full consideration for this purchase. They paid no other consideration except that which was involved in the decree of 1856, and which is supposed to have been satisfied by the sale. That decree was for a sum of Rs. 37, and the plaintiffs themselves in describing the property say that the jumma payable to the talookdar is sicca Rs. 33, and that the net annual profit of the chuck is Rs. 75. So that if they got this chuck for the consideration of the decree-debt of 1856, they will certainly make a very good bargain. But more than this, as has been already mentioned, the decree of 1860 passed against Dinobundhoo Bundopadhya jointly with the Pals was for the arrears of rent of several years, one of which remarkably enough was this very year 1262 for which the decree of 1856 was before passed.

It is said that in making the claim in this second rent suit, the plaintiffs accounted in some way for the rent of 1262. But unfortunately we have not the plaint before us, and are unable to satisfy ourselves precisely how the plaintiffs placed that case. There is, however, no doubt that they claimed rent in that suit in respect of all these years. In the judgment of the Lower Appellate Court we find it said :—"The plaintiffs state they took "advantage of the provisions of Act VIII of "1831 against defendants 6 and 10 for the "rent of the years 1259 to 1265 after "deduction of payments," and plaintiffs got a decree. Either they obtained satisfaction of that decree, which in that event wiped off the decree debt of 1856, or they have it in their power to obtain satisfaction. In either case, it does not appear very equitable that the plaintiffs should be allowed to succeed in the present suit.

But the second question is perhaps a more serious one than the first. By suing Dinobundhoo Bundopadhya for the rents of this tenure, and in that suit obtaining a decree against him, the plaintiffs undoubtedly did acknowledge the liability of Dinobundhoo to pay the rent for which they sued ; and this liability was incurred simply by virtue of the transfer.

It was argued before us that the plaintiffs did not do this of their own will, but were forced to do so by reason of the position taken up by the persons whom they had sued, and possibly by the action of the Court. This means that they were unable to get their decree against the persons whom they had sued, unless they joined with them Dinobundhoo. And finally the decision of the Court in that case was to the effect that Dinobundhoo was liable to pay the rent of this tenure. So that when the sale took place on the 12th July 1861, it was a matter beyond dispute between the parties that Dinobundhoo was a tenant, or at any rate part tenant, of this tenure under the plaintiffs. It was no longer the exclusive property of the decree-debtors of 1856, and that to the knowledge of the plaintiffs themselves. We were referred to several well known decisions as authorities to show that the transfer of the tenure between the date of the decree passed in the Collector's Court against the tenants and the date of the sale of tenure, does not interfere with the zemindar's right to sell, provided the names of the transferees of the tenure have not been entered in his serishtah. And then it is said that even if the facts which have just now been referred to, be allowed their full force, they fall short of being equivalent to the entry of the name of Dinobundhoo Bundopadhya in the plaintiff's serishtah. We think that there is no magic in the mere entering of their names in the serishtah. The decisions cited merely go to this extent, namely, that the tenant cannot himself by merely alienating his tenure deprive the zemindar of the right which he would otherwise have to sell the tenure for arrears of rent ; that unless the zemindar has been made aware of the transfer and has acknowledged it, he may still have recourse to the tenure as if it were really the property of the judgment-debtor, notwithstanding that it has in fact been alienated. It might be put in this way that he can, notwithstanding the transfer, sell the tenure in the lands of the transferree not being one of the judgment-debtors, if he does so with reasonable promptness and provided he has not done any thing to recognize the transfer. We think in the present case, that although the name of Dinobundhoo was not entered in the zemindar's books as a tenant, and although the plaintiffs were reluctant to recognize him as tenant, and refused until the last to acknowledge the transfer, yet ultimately they did so when they chose as the better course to make him a party to the suit for rent and accepted a decree against him jointly with other persons for that rent.

We think, on the whole, that the plaintiffs ought not to succeed in the present suit. Consequently the decrees of the Lower Courts must be reversed and the plaintiffs' suit dismissed with costs.

Digitized by Google

The 21st December 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges*

Mesne Profits (how to be measured).

Case No. 1176 of 1874.

Special Appeal from a decision passed by the Officiating Judge of East Burdwan, dated the 8th April 1874, reversing a decision of the Subordinate Judge of that district, dated the 31st December 1873.

Teluck Chand Baboo (Plaintiff) *Appellant,*

versus

Soudaminee Dossee and others (Defendants) *Respondents.*

Mr. C. Piffard and *Baboo Taruchnath Sen* for Appellant.

Baboos Chunder Madhub Ghose and *Ashootosh Dhur* for Respondents.

Mesne profits are not what a party wrongfully in possession might have collected, but what the party wrongfully kept out of possession might have collected but for the intervention of the wrong-doer.

Markby, J.—In this case it is found that the appellant purchased the lands in question at an auction-sale in execution of decree as being the property of one Umbika Churn Roy. Three days later, at another auction-sale in execution of decree, the respondent purchased the same lands as being the property of Grish Chunder Roy. After this very unsatisfactory proceeding, the Court seems to have made some sort of pretence of putting both purchasers into possession, but the party who actually got into possession was the respondent. The appellant, however, brought a suit and established his title, and this suit is brought by the appellant to recover mesne profits for the period during which he was kept out of possession by the respondent.

The first Court found that the mesne profits of the lands in possession of the respondent were Rs. 2,179-2-7-5, subject to a deduction of Rs. 1,211-9-4 paid by the respondent for Government revenue, and deducting this he gave a decree for Rs. 970-9-3-5 against the respondent. There was another defendant in the suit against whom a separate decree for mesne profits of other lands was made in favor of the appellant, but that decree is not before us in this appeal.

The District Judge found that the mesne profits for which the respondent was liable only amounted to Rs. 205, and ultimately made a decree in the respondent's favor for Rs. 1,077-12-8 on account of the revenue paid by him in excess of the profits of the land during her possession.

The District Judge has stated the law to be that "the party found to have been "in wrongful possession is liable to account "for the rents which he has actually collected "or which, with ordinary and due diligence, "he might have collected." This is not quite accurate. The law as settled by numerous decisions of this Court is that the mesne profits are not what the party wrongfully in possession might have collected, but what the party wrongfully kept out of possession might have collected but for the intervention of the wrong doer.

The District Judge, however, ultimately finds "that the plaintiff (appellant), had he been in possession himself under the circumstances, could not have collected more than the respondent has been made liable for." This is in form the true question for consideration, and it, therefore, becomes necessary to see whether the District Judge has really tried this question or that which he originally proposed.

Now looking to the reasoning by which the District Judge arrives at the conclusion that the appellant "under the circumstances" could not have collected more than he has allowed, it is clear that the circumstances

Digitized by Google

which the District Judge here alludes to are the circumstances mentioned in a previous paragraph, namely, that there were other claimants of the property besides the appellant and respondent, and that therefore it was not possible to collect to any considerable extent the rents from the ryots; and that the respondent had done all that she could be reasonably expected to do in endeavouring to collect the rents.

It does not appear to us that any objection can be taken to the decision of the District Judge upon the ground that he has taken into his consideration the circumstance that the possession was disputed. It is contended that this being a dispute for which the appellant is responsible, this circumstance cannot be in any way considered in calculating the profits which the appellant would have made had he been in possession, and that the real basis of calculation is what the appellant would have collected had his possession been undisturbed.

It is, however, clear that to some extent at any rate the District Judge was right in considering this circumstance. Had the respondent been entirely out of the way, there is no reason to suppose that the appellant could have collected the rents undisturbed; inasmuch as a third person Raj Kristo did actually collect rents to a considerable extent.

As regards the share which the respondent had in disturbimg the appellant's possession, there can be no doubt whatever that a party cannot intrude himself upon property which is not his own; and then, having thus created a state of things in which the ryots cannot be got to pay their rents, set up this as an answer to the claim for mesne profits; and if in the present case any loss of rent could be fairly traced to the respondent having wrongfully taken possession, we have no doubt that she is liable whether she could have successfully sued the ryots or nof.

It does not, however, follow that because rents have not been collected that they have, therefore, been wholly lost: in some case, the claim may be barred; in others, the ryots may have left or died; but in others they may be ready to pay on demand, or may easily be made to pay, now that the dispute as to title is settled.

Now the District Judge finds that the respondent in this case sent the appellant a letter enclosing a schedule of her actual collections amounting to Rs. 205, and offering to confront him with the ryots and satisfy him that she had collected no more, and to produce the rent papers, and assist in recovering the back rents; but the appellant, without taking any notice of this offer, brought the present suit.

It appears to us that the conduct of the appellant in this respect was reprehensible. The request was a perfectly fair and reasonable one, and had it been, as it ought to have been, fairly met, this litigation might have been avoided: and if the District Judge had called upon the appellant, under these circumstances, to point out and even to prove in what particular cases he had been deprived of the rents by the action of the respondent, we should have considered that he was justified in doing so.

It appears, however, that this is not what the District Judge did. He has considered, not what the appellant has been prevented from collecting by the wrongful act of the respondent in taking and keeping possession, but what the respondent could have collected; for he called upon the appellant to show that the respondent might, with due diligence, have collected more than she had done, so that though he ultimately finds that the respondent is liable for what the appellant might have collected; it is clear that he has really considered that other question, namely, what the respondent might have collected, as laid down erroneously in the earlier part of the judgment.

It seams to us, therefore, that the decision of the District Judge must be set aside, and the amount of mesne profits must be enquired into afresh, unless the appellant is wise enough to act in the same spirit of fairness which has been shown by the respondent, in which case this matter might, we have no doubt, be very easily settled to the advantage of both parties without further litigation.

Our order will be that the District Judge will try the issue, what rents the appellant has been prevented from collecting by the wrongful taking possession of the property in suit by the respondent; this, which is the proper form of issue for this case has not yet been tried. Whether or no any further evidence should be taken will be entirely in the discretion of the District Judge. The finding will be returned to this Court, and the question of set-off will be considered when the case comes back and it is ascertained for what amount of mesne profits the respondent is liable.

Digitized by Google

The 7th September 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. MacDonell, *Judges.*

Diluvion—Reformation—Accretion.

Case No. 131 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Fureedpore, dated the 11th March 1872.

Buddun Chunder Shaha and others (Defendants) *Appellants,*

versus

Bepin Beharee Roy (Plaintiff) *Respondent.*

Baboos Hem Chunder Banerjee, Sreenath Doss, and *Kishen Dyal Roy* for Appellants.

Baboos Mohinee Mohun Roy and *Doorga Mohun Doss* for Respondent.

Defendants were owners, by purchase from Government, of a property called Ooojan Chur, which in its origin was an island thrown up in the bed of the river. Plaintiff was owner of the original estate of K, of which a great part was cut off by a stream channel of the river; but afterwards reappeared, and for some time lay in contiguity with defendant's chur, and separated from plaintiff's estate, by the said channel. By the gradual filling up of the sota, reformation became more and more extensive until the land again lay in contact with the plaintiff's estate.

As it had been clearly ascertained by boundary marks and measurements that the reformation took place on the original site of the plaintiff's land, the right of the plaintiff as by reformation was held to be preferable to that of the defendants, which rested upon accretion.

Jackson, J.—We do not think it necessary in the present case to deliver judgment at very great length, because we are satisfied that the decision of the Court below is correct both as to its finding of fact and its application of the principles of law which have been repeatedly affirmed by the Judicial Committee of the Privy Council in cases very well known, *viz.*, in the case of Lopez against Muddun Mohun Thakoor,* in V Bengal Law Reports, page 521, and the case of Nogendro Chunder Ghose,† cited by the appellants themselves in X Bengal Law Reports, page 406. The respondent's vakeel wisely and moderately, as we think, abstained from any attempt to impugn the findings of fact arrived at in a very careful and apparently well-reasoned report of the Ameen deputed to visit the spot and compare the existing land with the previous Government maps of 1865 and 1868, and from the report so arrived at and the maps which are put in, we may safely conclude that the condition of things was something like this, *viz.*, that the defendants were owners by purchase from Government of the property called Oojan Chur, which in its origin was an island thrown up in the bed of the river; that the plaintiff was the owner of the original estate of Khankhonapore; that some time about the year 1267, may be a little sooner or later, diluvion commenced, by which a stream, not the main stream of the river, but a channel which was at one time deep but which is now filled up, cut off a great part of the estate of the plaintiff; that a portion of the lands afterwards re-appeared, and for some time lay in contiguity with the defendants' Oojan chur separated from the plaintiff's estate by the said channel; and that by the gradual filling up of the sota, reformation became more and more extensive till the land again lay in contact with the plaintiff's estate. It has been clearly ascertained by boundary marks and measurements that the land now claimed is reformation on the original site of the plaintiff's land, and that being so, in accordance with the principles laid down in Lopez's case, and the interpretation put by their Lordships of the Judicial Committee upon the first clause of Section 4, Regulation XI of 1825, *viz.*, that that clause does not operate in cases where the reformation of the land can be clearly identified as caused by the transfer of land from one estate to another, the right of the plaintiff as by reformation is preferable to that of the defendants, which rests upon accretion. In the

* 14 W. R., P. C., 11.
† 8 W. R., P. C., 17.

Digitized by Google

case of Nogendro Chunder Ghose the facts have strong resemblance with those of the present case. Their Lordships in page 432 of the Bengal Law Reports say:—"The "appellants having then established a *primâ* "*facie* title to the land in dispute as a "reformation, the question is whether the "respondents have a superior title to it as "an accretion to their settled chur. It is "not easy to see upon what principle a title "to alluvion by gradual accretion should "prevail against the original ownership "established by identification of site; unless "it be that, where the accretion is so gradual "as to be latent and imperceptible during its "progress, the law on grounds of conve-"nience presumes incontrovertibly that no "other ownership can be shown to exist, "and so bars enquiry." But in fact the case of the defendants here was not originally, nor is it upon the evidence, a case of gradual imperceptible accretion. On the contrary, it seems to have been the result of a change in the course of the stream, which has since then returned to its original condition. Again, in the same case their Lordships say:—"There are peculiar reasons "why the title of the plaintiffs should be "preferred to that of the defendants. The "latter do not claim the land as an accretion "to their original estate. They claim it as "an accretion to the chur cast up by the "river, and settled with them by Govern-"ment." This chur also was cast up by the river, and was purchased by the defendants from Government. A remark of their Lordships at page 433 has been very much relied upon by the appellants. The passage is this:—"Such a case as the present is very "distinguishable from the ordinary case con-"templated by the Regulation, in which a "river gradually shifting its channel in one "direction, continually eats into one bank, "and leaves the other, never ceasing to flow "between the competing estates." It is suggested that their Lordships in that remark were contemplating a case which is precisely the present case. In the first place, we do not think that that is the present case. In the next place, the argument rested upon these words would have much greater effect if the case had been decided upon it, but it was not so: it was merely a remark thrown out in the decision of the Judge. We are satisfied that the decision of the Lower Court is correct both as to fact and law, and we think this appeal must be dismissed with costs.

[PRIVY COUNCIL JUDGMENT.]

The 10th December 1875.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

Suit by Mortgagee—Mokurruree Lease—Onus Probandi.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Shamnarain and others

versus

The Administrator-General of Bengal.

In a suit by mortgagees under a zur-i-peshgee mortgage, not only for possession, but also for setting aside a mokurruree lease, which was alleged to have been granted by the mortgagor prior to the mortgage, and under which defendants had been in possession for some time in accordance with a Magistrate's order:

HELD, that the *onus* was on the plaintiffs to give some evidence to impeach the validity of the mokurruree; but this having been done, and a strong *primâ facie* case made out, the *onus* was shifted, and it became incumbent on the defendants to show that the mokurruree was executed before the zur-i-peshgee, and that it was granted *bonâ fide* for a real consideration, and intended to be operative as between the mortgagor and the lessee.

THIS suit was brought by the plaintiffs, whom the present respondents represent, claiming under a zur-i-peshgee granted by the Rajah of Ramnuggur, to secure the sum of Rs. 49,000. The zur-i-peshgee included 14 mouzahs, and among them a mouzah called Koorkoorcha.

It seems that the Rajah instituted a suit against the mortgagees to set aside the zur-i-peshgee, on the ground that it had been collusively obtained from him, charging Binda Lall, whom the appellants in this suit represent, with colluding with the mortgagees in obtaining the mortgage. Then a cross-suit was brought by the mortgagees under the zur-i-peshgee, being the suit in which the present appeal arises, against Binda Lall, for possession of the mouzah of Koorkoorcha, and to set aside a mokurruree lease alleged to be granted by the Rajah to him prior to the mortgage, under which he claimed the possession of the mouzah upon payment of the rent reserved by the mokurruree of Rs. 41.

The value of the mouzah was Rs. 850 per annum.

Both suits were heard by the Principal

* From the judgment of L. S. Jackson and Macpherson, JJ., in Regular Appeal No. 276 of 1860, decided on the 21st June 1871.

Digitized by Google

Sudder Ameen, who found that the zur-i-peshgee was a genuine instrument, and that it had not been obtained by fraud; and he affirmed the validity of it. He also found in the present suit that the mokurruree set up by Binda Lall was a fraudulent document, intended to prevent the mortgagees under the zur-i-peshgee from getting the full benefit of their mortgage as regards the mouzah Koorkoorcha.

There were appeals to the High Court from his decision. The High Court reversed the decree of the Principal Sudder Ameen, which affirmed the validity of the zur-i-peshgee, holding that although it was executed, the consideration had not been paid, and they set the zur-i-peshgee aside. The consequence of their deciding that the plaintiffs had no title under the zur-i-peshgee was that, in the present suit, it was held that they had no *locus standi* to set aside the mokurruree.

From these decisions of the High Court there were appeals to Her Majesty, and the result was that Her Majesty was recommended to reverse the decree of the High Court, which had set aside the judgment of the Principal Sudder Ameen, and disaffirmed the mortgage, and to set up his judgment which had held that the mortgage was valid.

That state of things left the question as to this mokurruree undecided, for the High Court had only decided against the mortgagees in this suit upon the ground that having no title in the mouzah they could not be heard to say that the mokurruree was invalid. It was therefore necessary, after the decision of this tribunal in the Rajah's suit, that the High Court should hear the original appeal in the present suit as regards the mokurruree upon the merits; and accordingly this direction was given in the order of Her Majesty in this suit:—"It is hereby "ordered that the decree of the High Court "of Judicature at Fort William in Bengal "of the 21st May 1863 be reversed, and the "cause remitted to the High Court, with a "declaration that the zur-i-peshgee deed "alleged to have been granted by the Rajah "of Ramnuggur to the appellant and his "brother is a valid instrument, and the High "Court is hereby directed, in case the re-"spondent does not appear within a reason-"able time to be fixed by the High Court, to "dismiss his appeal from the Zillah Judge "of Sarun to the High Court, with costs; "and if the respondent does so appear, then "the High Court is to hear and determine "the appeal on its merits, and in case the "respondent shall fail to appear in the "High Court,"—then here are further directions. The "respondent," being the appellant in the High Court, did appear, and the High Court heard the appeal, and gave judgment, affirming the original decision of the Principal Sudder Ameen, to the effect that the mokurruree was a fabricated and fraudulent instrument: and from that judgment comes the present appeal.

Mr. Doyne could not do otherwise than admit that the judgments of both Courts on the question of fact were against him, but the main point which he urged before their Lordships was that both Courts had improperly shifted the *onus*, and that, in consequence of the form of the present suit, it lay upon the respondents, the plaintiffs below, to show affirmatively that the mokurruree was invalid.

Their Lordships, having regard to the form of the suit, which was not only for possession, but for setting aside the mokurruree, and having regard also to the fact that for some time under a Magistrate's order, the appellant, or those whom he represents, were in possession under the mokurruree, think that, in the first instance, it did lie upon the plaintiffs to give some evidence to impeach the validity of the mokurruree, and that some *onus* was therefore upon them; but they are clearly of opinion that this *onus* was satisfied, and a strong *primâ facie* case to impeach the validity of the deed made out, and then the *onus* was shifted, and it was incumbent upon the appellant to show by satisfactory evidence that the mokurruree was really executed before the date of the zur-i-peshgee, and that it was granted *bonâ fide* for a real consideration and intended to be operative as between the Rajah and Binda Lall.

There are strong circumstances of suspicion in the case. Binda Lall was the mooktear of the Rajah, and notwithstanding that the Rajah had charged him with having acted collusively with the holders of the zur-i-peshgee in obtaining it from him, he kept him in his service. These facts are pointed out in the judgment of the Principal Sudder Ameen. It appears that the deed was not registered nor stamped at the time, the value of the mouzah was considerable, the rent very small, and there was no evidence that any consideration was paid. Considering the relation of the parties, and the facts which have been referred to, the Principal Sudder Ameen and the High Court seem to their Lordships to be perfectly justified in

Digitized by Google

saying that unless the holder of the mokurruree gave satisfactory evidence of its execution and of its *bona fides*, they could not hold that it was a valid instrument as against the zur-i-peshgee. The High Court do not affirm the judgment of the Principal Sudder Ameen without looking at the case for themselves, and it appears that they did look at the evidence to which Mr. Doyne referred, to satisfy themselves of its weight and effect, and they thought it was not the kind of proof that should be given in a case which, upon the face of it, was so suspicious. They say in their judgment :—"The point for "decision really and substantially is, whether "the case made out by the plaintiffs, resting "asitdoes upon the zur-i-peshgee deed, which, "on the finding of the Privy Council in the "several suits between these parties, is a good "and valid instrument, has been sufficiently "answered by the alleged mokurruree which "the defendants set up. Now, besides that "we have before us what seems a satisfactory "judgment of the Principal Sudder Ameen, "Moulvie Mahomed Wuheedooddeen, upon "this point, which was in issue in his Court, "that decision not being impugned upon "what appeared to be any valid grounds ; "in point of fact it seems that the defendant "gave neither in this case, nor in any of the "other cases in which these parties were "concerned, anything approaching to direct "evidence of the execution of his mokurruree. "It is shown that in another case between "Rajah Saheb Prolad Sen and the Tewarees, "some of the witnesses referred incidentally "to this mokurruree, and we are asked to infer "from that that those witnesses might, if "further examined, have given positive "testimony on the point ; and it is suggested "that the defendant had not fully present to "his mind the necessity of setting up the "mokurruree by direct evidence, and upon "that suggestion we have been asked, at this "time of day, to send this case back to the "Court of the Subordinate Judge of Sarun in "order that a fresh issue may be framed, and "the parties allowed an opportunity of "adducing evidence upon it."

The High Court, having referred to the only evidence given by the appellant in support of the mokurruree, held it to be entirely insufficient for that purpose ; their Lordships think that their judgment is correct, and that the High Court were also right in not putting a case of this description into a train for further inquiry. They will, therefore, humbly recommend Her Majesty to affirm the judgments appealed from.

[PRIVY COUNCIL JUDGMENT.]

The 12th December 1874.

Present :

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

Putnees—Sale under Reg. VIII of 1819, *s.* 8—*Construction of the word "Substantial."*

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Ram Sabuk Bose

versus

Monmohini Dossee.

The statutory sale of an under-tenure under Reg. VIII of 1819 cannot be set aside, because one of the witnesses to the notice (which was in fact served) turns out not to be substantial.

The High Court's construction of the word "substantial" in Section 8 of the above Regulation, as meaning a wealthy man from whom damages could be recovered by the putneedar in the event of the attestation being false, was held by the Privy Council to be too limited a view ; wealth being only one element in the position and status of the witness. If he lived in the neighbourhood and was a respectable man and of good character, their Lordships saw no reason why the Judge might not properly come to the conclusion that he was a substantial person.

IN this case their Lordships, having heard the argument on the appeal, propose to give judgment upon its merits, and some observations will subsequently be made on the objection which was taken to the statements in the petition of appeal.

The suit was brought by a putneedar to set aside the sale of his putnee talook, called Juggutbullubpore, which had been sold for arrears of rent through the Collector, under the provisions of Regulation VIII of 1819, and the defendants to the suit were the zemindar Muddun Mohun Haldar, and the purchaser at the sale, Ram Sabuk Bose. The plaint charged fraud on the part of the zemindar and the purchaser in the proceedings previous to the sale, and charged that the receipt of the notice which was served under the provisions of the Act had been forged. Various objections taken to the sale have been disposed of in favour of the defendants, and one only remains for consideration in the present appeal ; that is, whether the witnesses who have signed the receipt are substantial persons within the meaning of the Regulation.

* From the judgment of Kemp and Glover, JJ., in Special Appeal No. 280 of 1864, decided 18th February 1865, 2 W. R., *Civil*, 188.

Digitized by Google

The Regulation provides, in the second clause of the eighth section, for the manner in which the notice of sale shall be served and published. It directs that it shall be stuck up in some conspicuous part of the cutcherry of the zemindar, and it also provides for publicity and service in the cutcherry of the defaulter. It is with the latter only that it is necessary to deal in the present appeal. The Regulation says: "A similar notice shall be stuck up at the "sudder cutcherry of the zemindar himself, "and a copy or extract of such part of the "notice as may apply to the individual case "shall be by him sent to be similarly pub- "lished at the cutcherry or at the principal "town or village upon the land of the "defaulter. The zemindar shall be exclu- "sively answerable for the observance of "the form above prescribed, and the notice "required to be sent into the mofussil shall "be served by a single peon, who shall bring "back the receipt of the defaulter or of his "manager for the same, or in the event of "inability to procure this, the signatures of "three substantial persons residing in the "neighbourhood, in attestation of the notice "having been brought and published on the "spot."

It appears that the receipt of the defaulter could not be obtained. His gomasta was seen, but he refused to give one; and thereupon the peon obtained the signatures of seven persons who, it is alleged, resided in the neighbourhood. At the hearing before the Principal Sudder Ameen, evidence was given as to the residence and the status of three of those seven, and the Principal Sudder Ameen, being satisfied that they were substantial persons within the meaning of the Regulation, thought it unnecessary to go into evidence with respect to the other four; and he found in very distinct terms these three persons resided in the neighbourhood, and were substantial persons. This is his finding upon the facts:—"The "plaintiffs take exception to the above "seven persons not residing in the neigh- "bourhood of the defaulter's mehal. To "this it would be observed that Warris "Mollah, one of the seven persons above "alluded to, was the mundul of Juggut- "bullubpore, and Goluck Chowkeedar was "the chowkeedar of the village. These "two certainly are what the law calls 'sub- "stantial' men. As regards Kabel, though "not a man of much consequence, he was "known to carry on the trade of a tailor "in the village; consequently, a receipt "signed by, among others, three such men "as Warris, Goluck Chowkeedar, and Kabel, "must be considered a sufficient proof for "the service of notice. A more respect- "ably signed document cannot be, from the "circumstances of the country (the respect- "able portion of every community being at "all times averse to appear in a court of "justice) expected." The objection at their Lordships' bar was directed only to one of these witnesses, Kabel, who carried on the trade of a tailor. It has not been contended that the other two did not satisfy the requirements of the statute, although in the judgment under appeal it appears to have been held by the High Court, contrary to its former decision on the same point, that two of them did not satisfy its words.

There was an appeal from the finding of the Principal Sudder Ameen to the Judge of the 24-Pergunnahs; and Mr. Beaufort, the Judge of the 24-Pergunnahs, affirmed the decision. He affirmed it upon two grounds: first, upon the facts, and then that supposing the witnesses did not satisfy the statute, still notice having been really served upon the plaintiff, the putneedar, as was proved in the cause, through his gomastah, the non-compliance with the direction of the statute would not, under the circumstances, vitiate what had been done. His finding is:—"I am of opinion "that the appellants have failed to show "any sufficient ground for rejecting the "receipt. When the gomastah, who was in "the cutcherry, refused to give a receipt, the "peon brought the guru of the village, and "made him write a receipt under a tree "close by, and then he got some of the by- "standers to sign the receipt. The evidence "proves these facts, and proves that the "three persons who were called as witnesses "at the trial of the case in the Lower Court "saw the notice affixed to the door; and I "find no ground for holding that they are "not substantial within the meaning of the "law; I think that all that is required is "good evidence to the fact of the publica- "tion of the notice on a certain date, and "that that has been supplied in this case;" therefore he affirmed the judgment of the Court below upon the fact that these witnesses were substantial men. Then he goes on thus:—"I would go further and say that "the directions of the law are intended for "the guidance of the Collector only." Then he gives his reasons. "Before put- "ting up the putnee tenure to sale he must "require proof that the notice was duly

Digitized by Google

"served, and the law says that such "proof must be of such and such a nature. "The Collector is not required to take evi- "dence; he has to examine merely the "written documents produced by the zemin- "dar, and if the proof appears to be *primâ* "*facie* good, the putnee is sold on the re- "sponsibility of the zemindar. Then, if the "putneedar has recourse to the Civil Court, "the issue is not whether the proof adduced to "the Collector at the time of sale was strict- "ly within the words of the law, but "whether the evidence adduced before the "Court to prove the service of the notice "on or before a certain date, is credible "and satisfactory. The reasonable object "of the law is that the defaulter should "have timely notice of the intention to "sell; and if it be proved that such notice "was given to the satisfaction of the "Court, the number of witnesses present, "their actual *status* in social life, and the "distance of their dwelling houses, are points "which are immaterial." It is to be observ- ed that on this point there is a decision of the High Court, when Sir Barnes Peacock presided in it, to the same effect. In the case of Sona Beebee, Appellant, and Lall Chand Chowdhry and another, Respondents, reported in the 9th Weekly Reporter, page 242, the Chief Justice says: "This was a suit "to cancel a sale of an under-tenure under "Regulation VIII of 1819. The material "part of clause 2, section 8, Regulation VIII "of 1819, so far as this case is concerned, is "that the notice required to be sent into the "mofussil shall be served. The zemindar is "exclusively answerable for the observation "of the forms prescribed by that clause. "The subsequent part of the section, which "prescribes that the serving peon shall bring "back the receipt of the defaulter or of his "manager, or in the event of his inability to "procure it, that he shall obtain that which "by the Regulation is substituted for it, is "merely directory, and if not done does not "vitiate the sale, provided the notice is duly "served."

Their Lordships are disposed to agree with the judgment of the High Court as delivered by Sir Barnes Peacock, confined as it is to cases where there is proof that the notice was duly served. The consequences of holding that a statutory sale of these putnees could be set aside, because one of the witnesses to the notice turned out not to be substantial, when it was in fact served, would be to give too great effect to form at the expense of substance.

The putneedar was not satisfied with these two decisions. Although the point is certainly small and narrow, whether this tailor was a substantial man or not, he appealed to the High Court. The two Courts below having found that in point of fact Kabel was a substantial person, his appeal could only be upon matter of law, namely, that they had misconstrued the Regulation and the meaning of the word "substantial." Upon this appeal to the High Court, he at first fared no better than he had done in the Courts below, and a Division Bench of the High Court affirmed the two former judgments, and for reasons which to their Lordships' minds are perfectly satisfactory. Having noticed some of the objections which are not now relied upon, they say:—"Next, as to these witnesses' "respectability. The word used in the Regu- "lation is 'substantial,' meaning, of course, "men who have some *status* in the commu- "nity, men of local influence or importance, "or respectability. We think that the law "has been complied with on this point also. "One of the witnesses is the Mundul, the "headman of the village; another is the "Chowkeedar, an official whose attestation is "always considered as the best possible in all "matters connected with service of notice." It is well to call attention pointedly to this finding as to the Chowkeedar, because it is entirely inconsistent with the decision of the same Division Bench upon review, where they considered that the Chowkeedar is not a substantial witness within the meaning of the Act. "The third appears to be a "tailor, residing temporarily at the place, "but who lives in the neighbourhood. "This man is declared to be not a pro- "per witness. We do not see why the "man is not to be considered competent to "attest the serving of notice. He appears "to be a respectable man, though not a rich "one; and besides, the phrase 'substantial,' "on which special appellant lays so much "stress, must be taken comparatively. In "a small village the measure of a 'substan- "tial' witness will, of course, be much "lower than in a place of importance."

The putneedar, still dissatisfied, applied for a review of that judgment, and, upon the review, the Court, consisting of the same two Judges, without much reference to or discussion of their former judgment, reversed it upon grounds to which I will now refer. In order to see upon what grounds the Court really acted in thus reversing their former judgment, it is necessary to say that they refer in their judgment to the contention of

Digitized by Google

Mr. Paul, the counsel for the appellant, in this way: "It is contended by Mr. Paul, the "learned counsel for the applicant for review, "that the law requires that the attesting "witnesses must be 'substantial,' that is "to say, responsible, moderately wealthy "men, against whom, in a case of false attes- "tation, the party injured may have his "remedy in a suit for damages." This is what they observe on the evidence: "Now, "in this case, the attesting parties are suffi- "cient in number, and they reside in the "neighbourhood, but, with the exception of "the Mundul, the rest are not what can be "called substantial persons. One is the "Chowkeedar of the village, and the other a "thika tailor. The Legislature invested the "zemindar with the power of bringing sub- "ordinate putnees to sale, and made him "exclusively answerable for the due obser- "vance of the prescribed processes under "which such tenures could be brought to "sale. To protect the putneedar from fraud, "it was enacted that the notice of sale must "be attested by three substantial persons. "Now it is clear that, unless the attesting "parties answer to the common meaning to "be put upon the word 'substantial,' the "putneedar would be wholly without remedy "in case of false attestation." Now the Court, this being a special appeal, could only decide upon some matter of law, and the matter of law which they appear to rule upon the construction of this Act is that the word "substantial" means a wealthy man from whom damages could be recovered by the putneedar, supposing the attestation to be false.

Their Lordships think that this is too limited a view. It is, no doubt, desirable that men of property should sign these receipts if they can be obtained, but wealth is only one element in the position and *status* of the witness, and if he lives in the neighbourhood, and if he be a respectable man and of good character, their Lordships see no reason why, upon evidence appearing of such facts, of which the Judge in each case must satisfy himself, the Judge, in estimating the position of the man, may not properly come to the conclusion that he is a substantial person. In the present case, the evidence appears to show that the man objected to carried on the trade of a tailor, that he had lakheraj lands, that he lived in the neighbourhood, was well known, and was (to use a description built up of many circumstances) a "respectable" person. Their Lordships think that upon such evidence the Judge of first instance and the Judge of the 24-Pergunnahs, who had a right to review his decision on questions of facts, might properly come to the conclusion that the witness was a substantial man. Their Lordships, therefore, think that the first judgment of the High Court was more correct than the last.

On these grounds, their Lordships have come to the conclusion to reverse the second judgment of the High Court upon the review; but inasmuch as the zemindar Mudduu Mohun has not appealed from that judgment, they see no reason to give him relief, so far as the order affected him personally only; that is to say, so far as it ordered him to pay the costs; and therefore the reversal of the judgment will be without giving any right to him to have any costs that he may have paid under it refunded.

Their Lordships have given very serious attention to the objection raised by Mr. Graham, on the part of the respondents, to the inaccurate statements in the petition for leave to appeal to Her Majesty. The appeal was made to Her Majesty upon special grounds, one being that the question was of considerable practical importance upon the construction of the Regulation. The petitioner was obviously out of time, and he could only obtain leave to appeal by excusing that lapse of time. Some of the statements in the petition are clearly inaccurate. It is stated, among other things, that the petitioner himself had applied for review of the judgment now appealed from on the 3rd of February 1866, and that the learned Judges of the Division Bench differed in opinion as to the propriety of allowing the application, and did not allow it; and he introduced the fact of that petition to the High Court as an excuse for a part of the delay, alleging further that, according to the then understood practice of the Court, which he says was afterwards changed, the application was in time. It turns out that the statement is inaccurate in this, that he did not petition the Court for a review of the judgment at all, but that the petitioner was the zemindar Muddun Mohun. Now when he came to excuse himself for the lapse of time, it is obvious that he should have been particularly careful to give their Lordships accurate information upon the points relating to that petition for review. If he had correctly stated the facts in his petition, although the point to be decided in the appeal was one of general importance, leave to appeal might not and probably would not have been granted.

Digitized by Google

There is, therefore, a material misstatement in the petition.

Their Lordships have considered whether the misstatement was intentionally made with a view to deceive this tribunal; and if they had been clearly satisfied that this was the intention of the petitioner, or of those who advise him in India, they would, even at this late stage, dismiss the appeal; but they are not fully satisfied that such was the intention; and although the misstatement is material, and one that clearly ought not to have occurred, and shows, at least, a great deal of culpable negligence, they are not so satisfied that it was done with the intention to deceive, as to dismiss the appeal at this late period. They desire, however, to say that they think so seriously of this objection, and it is so necessary to insist that there should be *uberrima fides* on the part of those who come for leave to appeal, on special grounds, to Her Majesty, that they must mark their sense of what has occurred by refusing to give to the appellants the costs of the appeal. They desire further to say that if the objection had been made, as it ought to have been, by a preliminary motion, they have little doubt that motion would have been successful, and the order for hearing the appeal rescinded. Even if it had been made before the appeal had been entered upon at their Lordships' bar—when it was called on—they must have yielded to it; but considering that the appeal has been heard upon the merits, that Mr. Doyne's observations upon the facts and the law had been concluded, and it was only in the course of the argument for the respondents that this objection was taken, they think, under all the circumstances of the case, that they ought not now to dismiss the appeal, and that it will be enough to mark their sense of the impropriety of the petition by the refusal of costs.

In their Lordships' opinion, an objection of this kind ought to be taken by the respondents as early as the matter is brought to their notice, for the plain reason that if the leave to appeal is on that ground rescinded, no further costs are incurred, and it is wrong to leave the objection until the hearing of the appeal, when the record has been sent from India, and when all the costs attending the hearing have been incurred. In the present case not only was there no preliminary motion made to rescind the leave to appeal, but the respondent's case, although referring to the facts, did not point to them with distinctness, and there is no reason directed to the objection.

Under these circumstances, their Lordships think that they will best perform their duty, the appeal having been heard, and their Lordships being clearly of opinion that the judgment appealed from is wrong, by reversing that decision, but doing so without costs; and that will be the recommendation they will humbly make to Her Majesty.

The 14th December 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Hindoo Law—Succession—Brother's Daughter's Sons—Paternal Grandfather's Great Grandsons.

Case No. 273 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 12th November 1873, affirming a decision of the Moonsiff of Serajgunge, dated the 29th July 1872.

Gobind Pershad Talookdar and another (two of the Defendants) *Appellants*,

versus

Mohesh Chunder Surmah Ghuttack (Plaintiff) *Respondent*.

Baboo Rash Beharee Ghose for Appellants.

Baboo Issur Chunder Chuckerbutty for Respondent.

In a suit disputing the succession to the property of C. P., deceased, the plaintiffs were his brother's daughter's sons, and the defendants his paternal grandfather's great grandsons.

Adopting the principle of the Full Bench decision in 13 W. R., F. B., 49, the Court felt bound to consider which of the parties was competent to confer the greatest amount of spiritual benefit on the deceased. Accordingly, it was found that the defendants offer one oblation in which the deceased participates,—*viz.*, to his grandfather, and their great grandfather; and that the plaintiffs offer two, *viz.*, to his father and grandfather being their great grandfather and great-great-grandfather. But as these are maternal ancestors of the plaintiffs, whilst the oblation of the defendant is offered to a paternal ancestor, and the latter is of superior religious efficacy (the difference of number being no ground of preference where, as here, the cakes are not of the same description), it was held that the defendants were to be preferred to the plaintiffs, and were the heirs of C. P.

Couch, C.J.—The plaintiffs in this suit are the brother's daughter's sons of Chundee

Digitized by Google

Pershad, and the 1st and 2nd defendants are his paternal grandfather's great grandsons. The wife of Chundee Pershad survived him, and died in Bysack 1278. The property which is the subject of the suit is claimed by the plaintiffs as the heirs of Chundee Pershad according to the Hindoo law current in Bengal. Both the Lower Courts have decided in the plaintiff's favor, and the defendants have appealed to this Court.

The question thus raised is one upon which the authorities upon the law in Bengal do not agree. In the Dayabhaga, Chapter II, section 6, verse 9, it is said:—"The succession of the grandfather's and great-grandfather's lineal descendants, including the daughter's son, must be understood in a similar manner, according to the proximity of the funeral offering, since the reason stated in the text 'for even the son of a daughter delivers him in the next world, like the son of a son,' is equally applicable, and his father's or grandfather's daughter's son, like his own daughter's son, transports his manes over the abyss by offering oblations of which he may partake." The verse which precedes this is:—"But on failure of heirs of the father down to the great grandson, it must be understood that the succession devolves on the father's daughter's son (in preference to the uncle), in like manner as it descends to the owner's daughter's son (on failure of the male issue in preference to the brother)." The brother's daughter's son, or grandfather's granddaughter's son is not included here. It is only a daughter's son who is included with the lineal descendants, the reason for it being given. The brother's daughter's son is not anywhere expressly mentioned by this author, but he is nevertheless entitled to be recognized as an heir for the reasons given in the judgment, which we shall presently refer to. In Sreekrishna's commentary on the Dayabhaga, the brother's daughter's son is in like manner omitted, but in the Dayakrama Sangraha he states a different rule. Chapter I, section 10, verse 1, is:—"On failure of the brother's grandson, the succession goes to the father's daughter's son, for he presents three funeral oblations,—namely, to the father, paternal grandfather, and paternal great-grandfather of the deceased owner, *i.e.*, to his own maternal grandfather, maternal great-grandfather, and maternal great-great grandfather." Verse 2 is:—"In default of the father's daughter's son, the brother's daughter's son succeeds, for he presents two funeral cakes, in which the deceased owner participates,—namely, to his (the owner's) father and paternal grandfather." Verse 3 is:—"Failing him, the paternal grandfather is the successor, for as the father is entitled to succeed on a failure of the heirs of the deceased owner ending with the daughters' son, so by the rule of analogy, the succession devolves on the grandfather in default of heirs down to the father's daughter's son, and because he presents one oblation, (namely, the owner's paternal great-grandfather, *i.e.*, his own father) in which the deceased owner participates." The three verses are not consistent. If by "failing him" in the 3rd is meant the brother's daughter's son, who is named in the 2nd, there is an inconsistency with the words "so by analogy the succession devolves on the grandfather in default of heirs down to the father's daughter's son;" but if the second verse be omitted, "failing him" will refer to the father's daughter's son named in the first, and there will be no inconsistency. In the first verse the author gives a different reason for the succession going to the father's daughter's son from that given in the Dayabhaga. It is the presentation of three funeral oblations, but they are to maternal ancestors. So are the oblations mentioned in verse 2, but the one oblation in verse 3 is to a paternal ancestor. An appearance of consistency is given to the three verses by treating this as only of the same efficacy as an oblation to a maternal ancestor, and making the succession go according to the number of oblations. But this seems not to be correct. In Colebrooke's Digest, Book V, Chapter VIII, section 1, it is said in the commentary on verse 434 by Juggarnatha:—"The oblations presented to the maternal grandfather and the rest are secondary, because they must follow funeral cakes offered to paternal ancestors; the son of a granddaughter can have no claim, while the giver or sharer of a principal oblation exists. Nor should it be objected, as a consequence, that the son of the late proprietor's daughter or of his father's daughter, and so forth, could have no title, if any kinsman within the degree of a *sapinda* were living. The Mahabharata showing that a daughter's son procures advantage even by his birth alone (Chap. V.) it appears that he does confer important benefits."

Sreekrishna deals with the uncle's daughter's son and paternal grandfather's daughter's son in the same way in verses 9 and 13, but when he comes to the heirs on the maternal side they are omitted. According to

Digitized by Google

the Dayatatwa, on failure of the heirs of the father down to his daughter's son, the paternal grandfather succeeds; on failure of him, the paternal grandmother; in default of her, the descendants of the paternal grandfather, including his daughter's son; in their default, the paternal great-grandfather, paternal great-grandmother, and the descendants of the paternal great-grandfather, including his daughter's son succeed. Previous decisions having been overruled by a Full Bench decision of this Court, it will be better at once to refer to that. In Guru Gobind Shaha Mundul *versus* Anund Lall Ghose Mojoomdar,* V Bengal Law Reports, p. 15, the question was whether, under the Hindoo law current in the Bengal school, the son of a paternal uncle's daughter is entitled to succeed to the estate of a deceased Hindoo, if no nearer heirs are forthcoming? Mr. Justice Mitter, who delivered the judgment, began by saying:—"The solution of this "question depends upon the true construction "of the Dayabhaga, a treatise on the Hin- "doo Law of Inheritance by Jimutavahana, "the acknowledged founder and chief of the "Bengal school. The other authorities cur- "rent in that school, such as Dayakrama "Sangraha of Sreekrishna Turkalunkar, the "Dayatatwa of Rughoonundun, and the "Vivada Bhangamul of Juggarnatha Turka- "punchanana, are all of them almost exclu- "sively founded on the Dayabhaga; and such "difference of opinion as there is between "them and the fundamental treatise is "entirely confined to a few cases of detail "which involve no conflict of principle of any "kind whatever. Such then being the state "of our authorities, it is necessary, first of "all, to ascertain whether the Dayabhaga "itself is founded on any general doctrine or "principle which will enable us to arrive at "a satisfactory conclusion on the point now "under our consideration. We are of opi- "nion that there is such a principle, and that "it is no other than that of spiritual benefit. "That the Hindoo law of inheritance, in the "evident acceptation of the term, is essen- "tially based upon consideration relating to "the spiritual welfare of the deceased pro- "prietor, is a proposition beyond all dispute. "All the ancient rishees, or Hindoo sages, "whose texts are regarded as the fundamental "source of that law, and all the commentators "on it whose opinions are recognized as "authorities in the different schools current "in the country, are unanimously agreed in "accepting these considerations as their chief, "if not as their exclusive, guide. The author "of the Dayabhaga is no exception to the "rule. On the contrary, he is clearly and "expressly of opinion, as we will presently "show, that the whole theory of inheritance "is founded upon the principle of spiritual "benefit, and that it is by that principle alone "that questions relating to it must be "determined."

After illustrating and enforcing this proposition, the learned Judge says:—"As to "the male heirs we may divide them for the "sake of convenience into the followin "classes:—

"1.—*Sapinda*, strictly so called, or in "other words, relatives connected through "the medium of undivided oblations.

"2.—*Sakulayas*, or relatives connected "through the medium of divided oblations.

"3.—*Samanodakas*, or relatives con- "nected by libations of water.

"4.—Certain specified strangers, com- "mencing with the spiritual preceptor and "ending with the learned brahmin of the "same village, leaving aside the king, who "is entitled to come in more by right of "escheat than by that of inheritance.

"Here again we find that the same prin- "ciple is in operation throughout. The "*sapindas* are allowed to come in before the "*sakulayas*, because undivided oblations are "considered to be of higher spiritual value "than divided ones; and the *sakulayas* are "in their turn preferred to the *samanodakas*, "because divided oblations are considered to "be more valuable than libations of water. "The members of the last class are not com- "petent, it is true, to offer either oblations of "food or libations of water; but even in their "case the doctrine of spiritual benefit is not "forgotten. Thus, for instance, the lowest "amongst them,—namely, the learned "brahmin of the same village,—is allowed to "come in upon the express ground that the "virtue of the deceased proprietor 'is renewed "by the acquisition of fresh merit through "the circumstance of his wealth devolving on "a brahmin.' (Verse 26, section 6, Chapter "XI.) This, no doubt, is an extreme case "of the kind, but we wish to draw particu- "lar attention to it as an instance of the "extreme solicitude evinced by the author "of the Dayabhaga to provide for the spiri- "tual welfare of a deceased proprietor. "Again, when we come to look at the inter- "nal arrangement of each of these classes, so "far as the details of such arrangement are "actually given in the Dayabhaga, we find

* 13 W. R., F. B., 49.

Digitized by Google

"that the same principle is always kept in "view. Thus among the *sapindas*, those "who are competent to offer funeral cakes to "the paternal ancestors of the deceased pro- "prietor, are invariably preferred to those "who are competent to offer such cakes to "his maternal ancestors only; and the rea- "son assigned for the distinction is that the "first kind of cakes are of superior religious "efficacy in comparison to the second. "Similarly, those who offer larger numbers "of cakes of a particular description are "invariably preferred to those who offer a "less number of cakes of the same descrip- "tion; and where the number of such cakes, "is equal, those that are offered to nearer "ancestors are always preferred to those "offered to more distant ones."

He then determines that the son of a paternal uncle's daughter is competent to confer spiritual benefit on the deceased proprietor. Referring to the objections that had been urged against his right, he says that his being nowhere mentioned as an heir in the Dayabhaga is entitled to no weight whatever. And referring to an argument that the precise position which the son of a paternal uncle's daughter would be entitled to hold according to the principle of spiritual benefit would interfere with that which has been assigned by the author of the Dayabhaga to some of the heirs specified in the earlier part of Chapter II, he says:—"Whether this is "really the case or not we need not pause "to enquire, for what we have to determine "in the present case is not the precise posi- "tion which the son of a paternal uncle's "daughter is entitled to occupy in the category "of heirs, but whether he is entitled "to inherit at all. If the author of "the Dayabhaga has in fact given to any "particular heir or heirs a position which, if "not strictly consistent with the principle "which he has himself laid down for our "guidance, the utmost that can be said is "that that particular heir or heirs should be "allowed to retain that position. But the "circumstance, even if true, cannot be "accepted as a sufficient reason to justify "the total exclusion of one single individual "who is really competent to satisfy all the "requirements of that principle. If in any "case which may arise hereafter, it should "become necessary for us to determine the "precise position which the son of a paternal "uncle's daughter is entitled to hold in the "order of succession, the question would "fairly arise whether the details of a work "like the Dayabhaga ought to be permitted "to override the principle upon which it is "admittedly based. We have already "shown that, according to the author's own "interpretation of Menu, the nearest heir is "he who is competent to confer the greatest "amount of spiritual benefit on the deceased "proprietor."

Now it is to be observed that in this judgment, the passages in the Dayakrama Sangraha which are expressly in point are nowhere relied upon. They are not even referred to by Mr. Justice Mitter. In Gobindo Hareekar *versus* Woomesh Chunder Roy, Weekly Reporter, Special No. 176, the learned Judge, being Counsel for the appellant, had convinced three Judges of this Court, one being Mr. Justice Sumbhoonath Pundit, that the passage declaring the right of a brother's daughter's son to succeed as heir is an interpolation, and no part of the original text of Sreekrishna. It is true that the decision in that case that a paternal uncle's daughter's son cannot inherit is overruled, but it is not upon the authority of the Dayakrama Sangraha, and the question which would be settled by it is deliberately left an open one. We may then at least say that the authority of the Dayakrama Sangraha upon the question before us is so doubtful that we may disregard it; and with it must be placed the authorities which are only founded upon it. We must consider which of the parties to this suit are competent to confer the greatest amount of spiritual benefit on Chundee Pershad. The defendants offer one oblation in which he participates,—namely, to his grandfather and their great-grandfather. The plaintiffs offer two,—namely, to his father and grandfather, being their great-grandfather and great-great-grandfather. But these are maternal ancestors of the plaintiffs, whilst the oblation of the defendants is offered to a paternal ancestor. Mr. Justice Mitter, in one of the passages already quoted, says that among the *sapindas* those who are competent to offer funeral cakes to the paternal ancestors of the deceased proprietor are invariably preferred to those who are competent to offer such cakes to maternal ancestors only, because the first kind of cakes are of superior religious efficacy in comparison with the second. The oblation offered by the defendants being of superior religious efficacy to those offered by the plaintiffs, both being participated in by the paternal ancestors of the deceased proprietor, it seems to follow that the defendants should be preferred. The difference of number is not a ground of

Digitized by Google

preference when the cakes are not of the same description. "Similarly," Mr. Justice Mitter says, "those who offer larger number "of cakes of a particular description are "invariably preferred to those who offer a less "number of cakes of the same description." It is true that the author of the Dayabhaga makes three exceptions to this order of succession in the father's, grandfather's, and great-grandfather's daughter's son, but a special reason is given for it, which is not applicable to others.

Adopting the principle of the Full Bench decision, that of spiritual benefit, it appears to us that the defendants ought to be preferred to the plaintiffs, and are now the heirs of Chundee Pershad. The decrees of the Lower Courts will therefore be reversed, and the suit will be dismissed with costs in all the Courts.

The 15th December 1874.

Present :

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Ouster—Disturbance of Possession— Landlord's Liability.

Case No. 173 of 1873.

Regular Appeal from a decision passed by the 1st Subordinate Judge of Bhaugulpore, dated the 11th June 1873.

Mrs. Benjamin Douzelle (Plaintiff) *Appellant,*

versus

Girdharee Singh and others (Defendants) *Respondents.*

The Advocate General, Mr. G. Gregory, and *Baboo Omur Nath Bose* for Appellant.

Mr. Lowe and *Baboos Mohesh Chunder Chowdhry* and *Hem Chunder Banerjee* for Respondents.

Case No. 1326 of 1874.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 25th March 1874, *reversing a decision of the 1st Subordinate Judge of that district, dated the 11th June* 1873.

Mrs. Madeline Russam sued as Mrs. Madeline Collis (Defendant) *Appellant,*

versus

Mrs. Benjamin Douzelle (Plaintiff) *Respondent.*

Mr. Lowe and *Baboos Mohesh Chunder Chowdhry* and *Hem Chunder Banerjee* for Appellant.

The Advocate General, Mr. G. Gregory, and *Baboo Omur Nath Bose* for Respondent.

In the absence of any express agreement to the contrary, a landlord is under the implied obligation to indemnify his tenant against ouster or disturbance of possession by his own act, or by the acts of those who claim under him, or have a right paramount to his, but not against the wrongful acts of third parties.

Kemp, J.—THESE two appeals were heard together and one decision will govern both appeals. In Regular Appeal No. 173, Mrs. Douzelle, who is the plaintiff in both the cases, sued two parties Baboo Girdharee Singh, the zemindar, and Mrs. Madeline Collis who, we are informed, has since married and is now Mrs. Russam. The suit was to recover mesne profits in the shape of damages from the 15th Magh 1274 to the 21st Pous 1279. The allegations of the plaint were that the zemindar granted to the defendant Mrs. Collis, a lease of a 9 annas share in the first instance of talooka Rampore Bhutkora, which share was subsequently reduced by a decision relating to the proprietary right, between Baboo Girdharee Singh and his brother Baboo Doorga Dutt Singh. The term of the lease was from the 25th Kartick 1272 to 1280 Fuslee, and the jumma payable by Mrs. Collis to the zemindar was Rs. 8,018 ; that Mrs. Collis subsequently sub-let the property to the plaintiff Mrs. Douzelle at a jumma of Rs. 10,125 from 1273 to 1280 Fuslee under a pottah and kubooleut, dated the 15th December 1865. The plaintiff Mrs. Douzelle alleges that she held possession under this sub-lease from 1273 to the 14th of Magh 1274, and after this, the first party, the zemindar, contrary to law dispossessed the plaintiff; that a suit was brought by Mrs. Collis against the zemindar to recover possession and mesne profits, and that that

Digitized by Google

suit was decided on the 10th of April 1871, the Court holding that the deputation of a sezawal by the zemindar and his possession through that sezawal was a wrongful act on his part, and that the lessee Mrs. Collis was therefore entitled to re-enter; that after the passing of the said decree on the 10th of April 1871, the lessee Mrs. Collis took possession on the 21st Pous 1279, and is in khas possession without regard to the right of the sub-lessee, the plaintiff in this case; that therefore the plaintiff has a right to demand mesne profits in the nature of damages from the 15th of Magh 1274 to the 21st Pous 1279. During the argument in this case, the Advocate General who appears for the plaintiff, Mrs. Douzelle, informed the Court that he had no case as against Mrs. Collis, and that he did not claim damages as against her in this suit.

The Subordinate Judge, Moulvie Syud Wuheeduddeen, has dismissed the plaintiff's case. He holds that under the terms of the lease granted by the zemindar to Mrs. Collis she had no right to sub-let to Mrs. Douzelle, the plaintiff in this case. He also found that the claim for wassilat must be rejected, inasmuch as it is clear from the evidence and cess papers which were filed by the plaintiff in respect of another share in this mouzah that there were no profits. He further found that the kamut lands which were used for indigo purposes, and are from 4 to 500 beegahs in extent were still in the plaintiff's possession. The suit was, therefore, dismissed.

In the Special Appeal No. 1376, Mrs. Douzelle was the plaintiff, and Mrs. Collis at present, Mrs. Russam, was the defendant. In that suit the claim was to recover mesne profits from the beginning of the month of Falgoon to the end of the year 1280 Fuslee. In that case which came before the same Subordinate Judge, the Judge of Bhaugulpore in appeal from the decision of the Subordinate Judge has held that the plaintiff is entitled to recover the mesne profits claimed by her in that suit. In these appeals we have, therefore, to consider two points: 1*st*, whether the sub-lease by Mrs. Collis to the plaintiff Mrs. Douzelle was an act which she was competent to do, and whether the zemindar Baboo Girdharee Singh by his conduct and acts has waived in this case his right to determine the tenure of Mrs. Collis in consequence of the sub-lease to Mrs. Douzelle. The Subordinate Judge in Regular Appeal No. 173 held that the lessee Mrs. Collis was not empowered to sub-let to Mrs. Douzelle according to the terms of the lease. The Judge in Special Appeal No. 1376 has taken a different view on that point, and held that she was entitled to sub-let, and that the zemindar by his acts has waived any rights of forfeiture he may have had. Now it is clear from the decision passed on the 10th of April 1871, to which the zemindar was a party, that it has been held in that final decision that the act of the landlord in deputing a sezawal was an illegal act; that there was no arrear due at the time of the deputation of the sezawal, and therefore that the possession of the zemindar through his sezawal was a wrongful possession, and it was also held in that case that any right of forfeiture owing to Mrs. Collis having sub-let to Mrs. Douzelle had been waived by the zemindar.

We, therefore, have to consider the remaining point, namely, whether Mrs. Douzelle is entitled to any mesne profits by way of damages either from the zemindar or from her lessor Mrs. Collis. Now it is clear that a landlord, in the absence of any express agreement to the contrary, is under the implied obligation to indemnify the tenant against ouster or disturbance in his possession by his own act or by the acts of those who claim under or have paramount right to him, but not against the wrongful act of third parties. Now in this case the disturbance of the possession of Mrs. Collis, and in consequence of that of the sub-lessee Mrs. Douzelle, was not the act of Mrs. Collis, the immediate superior landlord of Mrs. Douzelle, but the act of the zemindar whose title was paramount to them both. We, therefore, think that if Mrs. Douzelle can show that she could have collected, if in possession, any sums in excess of what she had to pay to her lessor Mrs. Collis, she would be entitled to mesne profits in the shape of damages to that extent during the time she was out of possession. But in this case, we think Mrs. Douzelle is not entitled to any mesne profits The Judge of Bhaugulpore, although the first Court found on a question of fact that Mrs. Douzelle had not enjoyed any profits, and that she had not been able to establish by any evidence that she had suffered any loss by being disturbed in her possession, directed that the mesne profits should be ascertained in execution of the decree. It is one of the grounds of special appeal that the Judge has not gone into that question which was decided by the first Court, but as in the Regular Appeal No. 173 the same question arises, namely, whether Mrs. Douzelle is entitled to any mesne profits, and as the whole of the evidence is on

Digitized by Google

the record, it is not necessary for us to remand the special appeal for the Judge to come to a finding upon that question. At page 3, Appendix 2, will be found an authenticated copy of the plan for the Road Cess Department relating to a share of this talook which was filed before the Collector by Mrs. Douzelle's putwaree, and it shows that the annual rent of this share, namely, 7 annas 8¾ gundahs, was Rs. 9,782. Under Section 94 Act X (B.C.) of 1871, this schedule is evidence against the party who filed it. We have been asked in this case to look at certain papers put in by the putwaree of Mrs. Douzelle in this case, and to estimate the gross proceeds of the share which was sub-let to Mrs. Douzelle according to those papers. But we think that we cannot do so. We must hold Mrs. Douzelle to be bound by this statement that she put into the Collectorate for the purposes of the road cess, as showing the gross proceeds of the share of the talook that was sub-let to her; and if we were to allow her to put in evidence other papers to show that her profits were higher than they are shown to be in that schedule, we should be allowing her to take advantage of her own fraud upon the Government. We, therefore, hold her bound by that statement. We also find that her son Mr. William Douzelle, who has been examined in this case, has deposed that the kamut lands comprising some 4 or 500 beegahs of land were still in his possession. It appears to us, therefore, that as found by the Subordinate Judge there were no profits enjoyed by Mrs. Douzelle from this property. We, therefore, think that the Subordinate Judge's decision on the question of wussilat in Regular Appeal No. 173 was a correct decision, although we differ from him with reference to his finding as to the lease of the plaintiff having become determined by the act of the lessor Mrs. Collis granting Mrs. Douzelle a pottah contrary to the terms of her lease.

We dismiss the Regular Appeal No. 173 of 1873, with costs payable by Mrs. Douzelle. The Special Appeal No. 1376 of 1874 in which the defendant Mrs. Collis is the appellant must be decreed, the decision of the Judge reversed, and the plaintiff's suit dismissed with costs.

Birch, J.—I concur in holding that the plaintiff's suit should be dismissed with costs.

The 15th December 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Bond-suit—Money decree---Jurisdiction.

Case No. 320 of 1873.

Regular Appeal from a decision passed by the Subordinate Judge of Patna, dated the 15th September 1873.

Mahomed Khuleel (Defendant) *Appellant,*

versus

Mussamut Sona Kooer (Plaintiff) *Respondent.*

Moonshee Mahomed Yusoof for Appellant.

Mr. M. L. Sandel for Respondent.

Where a party suing on a bond, brings his suit in a district (S) other than that (P) in which the property hypothecated in the bond is situated, the Court of (S) has no jurisdiction to pass any but a money decree, leaving the Court of the other district (P) to execute it against the property hypothecated on receipt of a certificate from the Court of (S.)

Kemp, J.—THIS is very clear case, and the decision of the Subordinate Judge must be affirmed, but after hearing the arguments of the pleaders on both sides, we think that there are other reasons which might have been given to support the decision of the Subordinate Judge in this case. The plaintiff alleges that she was in possession of a 2½ annas share out of 10 annas out of 16 annas of a certain property, in which she says her right was acquired by an auction purchase, dated the 9th April 1872. The plaint further recites that Luck Ram and Brojo Coomar

Digitized by Google

Lall mortgaged the share stated above in the properties in suit under bonds, dated the 22nd of March 1861 and 10th of March 1865. Now there are two bonds put in of a date prior to the bonds mentioned in the plaint, namely, a bond of the 26th of July 1855 and another of the 31st of May 1856. The plaint goes on to say that as the money due under these bonds was not paid, a regular suit was instituted, and a decree obtained on the 30th January 1869; that when the plaintiff applied to sell the mortgaged properties, she was opposed by one Abdool Luteef, and his opposition being successful, the plaintiff was directed to bring a suit; that she accordingly sued both Abdool Luteef and Laek Ram and obtained a decision in her favor, dated the 5th of May 1871; that she then purchased the properties in dispute on the 22nd of February 1872, and that subsequently to her taking possession the present defendant ousted her on the 6th of February 1873: hence this suit.

The defendant's case was that the decision of the 5th of May 1871, on the basis of which the plaintiff asserts her lien and purchase is of a date subsequent to the decree declaring the defendant's lien; that the decree which the plaintiff obtained in the first instance, namely, the decree of the 31st of January 1869, was a simple money decree and created no lien on the property; that the mortgage created by the bond of the 10th of March 1865 was of a date subsequent to the mortgage made to satisfy the debt of Koonjo Beharee Lall, and that his rights have passed to the defendant by purchase in execution of a decree. Then with reference to the question of title, the defendant says that his bond of the 11th April 1868 was a renewal of the bonds of the 2nd and 9th of April 1864, these bonds being of a date prior to the bond of the plaintiff, dated the 10th of March 1865.

The Subordinate Judge found that the bond upon which Koonjo Beharee Lall sued out his decree, namely, the bond of the 11th April 1868, was not a renewal of the former bonds of the 2nd and 9th of December 1864, but was an entirely new transaction. He also found that there was a flaw in the defendant's title, in as much as the property in dispute not being within the jurisdiction of the Civil Court of Shahabad, the Subordinate Judge of that district had no jurisdiction to declare that Koonjo Beharee Lall had a lien against the property which is situated in the district of Patna. The plaintiff's case was therefore decreed.

In the grounds of appeal filed in this Court, the defendant appellant contends that the Subordinate Judge was wrong in holding that the bond of 1868 was not a renewal of the bonds of 1864. That is the main ground in the appeal before this Court. We have, therefore, to decide in the first instance, whether the plaintiff's mortgage was of a prior date to that of the defendant. Now it is true that the body of the plaint does not refer to bonds of a date prior to the year 1861, but there have been filed on the record of the case two other bonds, one of 1855, 26th July, and the other of the 31st May 1856. In the first of these, 2 annas out of 10 annas are mortgaged by Laek Ram, and in the subsequent bond of 1856 a further half anna share is mortgaged, or 2½ annas altogether. The third bond of the 22nd of March 1861 merely consolidates the two former bonds, no further money advance is taken, and the 2½ annas share is again pledged. Then the subsequent bond of the 10th of March 1865 recites the bond No. 3 of 1861, it recites the debt with interest, and it further mentions a sum in cash of Rs. 166, which was taken by Laek Ram, and the whole amount due together with the cash taken on that date was Rs. 6,375, and the 2½ annas share of Laek Ram and Brojo Coomar Lall was again pledged, so that independent of the question whether the Subordinate Judge was right in holding that the bond of the 11th of April 1868 was a fresh transaction and not a renewal of the former bonds to the defendant, dated respectively the 2nd and 9th December 1864, we have been shown clearly that the plaintiff" to say nothing of the liens of 1855 and 1856, had a clear lien upon this property on the 22nd March 1861; but we think that the Subordinate Judge has come to a right conclusion on the question upon which his decision is mainly based, namely, that the bond of 1868 is a fresh transaction altogether, and not a renewal of the former bonds of 1864. In the former bonds of 1864, the first bond was for a sum of Rs. 775 and the second for Rs. 550. In the bond of 1868, there is a recital that the borrower Laek Ram requiring money for the marriage of his daughter took a further sum of Rs. 675 from Koonjo Beharee Lall, making the total amount for which he was liable Rs. 2,000 plus interest; then there is a recital that the borrower hypothecates the "shae munderjeh dustabej sabek" and the "shae munderjeh dustabej hal." It is clear, therefore, that this is a new transaction, and on this part

Digitized by Google

of the case we have no doubt that the Subordinate Judge is right.

Then it has been argued that inasmuch as the plaintiff's decree of 1869 was a money decree, she has, therefore, purchased only the rights and interests of the judgment-debtor and nothing more, but we find that after the decree obtained by the plaintiff in January 1869, when she attempted to sell the properties hypothecated in satisfaction of that decree, she was opposed by Abdool Luteef. That opposition was for the time being successful inasmuch as it was held that the plaintiff held only a money decree, and she was referred to a regular suit. She then brought such a suit against both Abdool Luteef and the judgment-debtor Laek Ram, and the Judge in his decision in that suit, dated the 5th of May 1871, distinctly found that the share of Laek Ram was 2½ annas. The Judge gives the genealogical tree of the family: he shows clearly in that decision how Laek Ram was entitled to a 2½ annas share, and the decree is to the effect that the plaintiff is entitled to have her lien declared as against the 2½ annas share of Laek Ram. Clearly, therefore, what passed under the sale to the plaintiff on the 22nd of February 1872, was not simply the rights and interests of Laek Ram as contended by the pleader for the appellant, but the specific property mortgaged, namely, the 2½ annas share of Laek Ram and Brojo Coomar Lall.

Then there is the question of jurisdiction which we think is also very clear. The defendant is the purchaser in execution of a money decree obtained by a third party Koonjo Beharee Lall. It appears that Koonjo Beharee brought his suit in the Shahabad Court, and that Court, the property being situated within the jurisdiction of the Patna Court, had no jurisdiction to pass any but a money decree leaving the Patna Court to execute it against the property hypothecated, on the Shahabad Court forwarding a certificate. Therefore the Shahabad Court having declared the property hypothecated to be liable in execution of the decree passed by that Court has exceeded its jurisdiction. We have been shown, in support of this view, a decision passed by the Chief Justice and Mr. Justice Bayley in Regular Appeal, No. 142 of 1871, dated the 21st July 1872. *

On the whole case, we consider that the Subordinate Judge's decision is a right decision, and we dismiss the appeal with costs.

* 18 W. R., *Civil*, 287.

The 16th December 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Hindoo Widows—Reversioners—Cause of Action—Presumptions of Hindoo Law.

Case No. 277 of 1873.

Regular Appeal from a decision passed by the Subordinate Judge of Dinagepore, dated the 2nd September 1873.

Gobind Chunder Mojoomdar and another (Plaintiffs) *Appellants,*

versus

Dulmeer Khan and others (Defendants) *Respondents.*

Baboos Doorga Mohun Doss, Mohinee Mohun Roy, and *Bharut Chunder Dutt* for Appellants.

Baboos Sreenath Doss, and *Shushee Bhoosun Dutt* for Respondents.

Where the estate of a deceased Hindoo held jointly by his two widows, survives, on the death of one of them, to the surviving widow alone, no cause of action can accrue to the reversioners until the death of the survivor, even in respect of a moiety of the property.

Where Hindoo widows acquire property by advancing money during an interval when they are out of possession of their deceased husband's estate, the money so advanced cannot be presumed to be a part of the proceeds of that estate.

Phear, J.—We think that we cannot rightly disturb the findings of fact to which the first Court has come with reference to the dates of the deaths of two ladies, Rash Monee and Mohineebuttee. The result is that the plaintiffs' claim, so far as regards the 2 annas 10 gundahs share of Mohineebuttee or any portion of it, is barred: so far as regards the shares of Apoosheebuttee and Rash Monee, however, the case is different. We think on the admitted facts of the case that the inheritance was not taken by Apoosheebuttee and Rash Monee in separate shares, but was held by them both jointly for the estate of a Hindoo widow, and on the death of Rash Monee survived to Apoosheebuttee alone, because she was the survivor of the two joint partners. In this view, Apoosheebuttee obtained no cause of action upon the ground of the present suit against the defendants on the death of Rash Monee. The present plaintiffs were in fact the immediate reversioners upon the estate of the Hindoo widow. Therefore it appears to us that the Subordinate Judge was wrong in holding that the claim of the plaintiffs was

Digitized by Google

barred with regard to half the share of the two ladies. We think that the cause of action on which the plaintiff sues did not accrue to any one even in respect of a moiety of Radha Nath's property in these ladies' hands until the death of Apoosheebuttee, and therefore the plaintiff's suit, as regards the whole of this property, is not barred by lapse of time.

It remains then to see on the evidence before the Court what was the extent of the property of Radha Nath which these ladies held.

The defendants say that only 4 annas 15 gundahs share of this property was held by these ladies as representatives of the deceased husband Radha Nath; and the remaining 2 annas was property which they had acquired themselves.

The Subordinate Judge treats this part of the case as follows:—

"The plaintiffs in the plaint have claimed "6 annas 15 gundahs share as belonging to "their maternal grandfather Radha Nath. "The defendants plead that 4 annas 15 "gundahs share belonged to Radha Nath, "and 2 annas was the self-acquired property "of the widows, and that in all 6 annas 15 "gundahs share was held by the two widows. "It is established by evidence that after the "death of Radha Nath, his two widows "Rash Monee and Apooshebuttee, defrayed "the expenses of another suit of the said "Mohinee and of Shib Soonduree, daughter "of Magun Chand, third brother of Radha "Nath, and thereby obtained one anna share "from Mohineebuttee, and one anna share "from Shib Soonduree. The plaintiffs have "not been able to show that the said "expenses were paid from funds belonging "to the plaintiffs' maternal grandfather, and "consequently it is proved that the said "properties were acquired with the exclusive "funds of Rash Monee and Apoosheebuttee. "Hence the plaintiffs can urge no valid "objection to the sale of the exclusive "properties of the two widows for the "liquidation of their personal debts."

We cannot entirely agree with the Subordinate Judge in considering that the facts previously mentioned by him *prove* that the said property was acquired with the exclusive funds of Rash Monee and Apoosheebuttee. But the question before us is whether the plaintiffs have in this case shown that the whole of the 6 annas 15 gundahs was or ought to be treated as property belonging to Radha Nath or not. They do not adduce any direct evidence on the point; but they say that inasmuch as the two widows had the possession and enjoyment of the original 4 annas 15 gundahs belonging to Radha Nath, and as it is admitted by their representatives that they got the 2 annas from certain other ladies in consideration of moneys advanced by them for the purposes of carrying on certain litigation, it must be presumed that the moneys so advanced were savings from and part of the proceeds of the 4 annas 15 gundahs share. Possibly, if it appeared that Rash Monee and Apoosheebuttee were actually in the enjoyment of Radha Nath's 4 annas 15 gundahs share of the property at the time when they advanced the money, the case might be materially different from that which it now is, because we find it admitted that Rash Monee and Apoosheebuttee were for a very long period kept out of possession of the 4 annas 15 gundahs share of their deceased husband's property, and according to the statement made by the defendants the money which they advanced to the other ladies was advanced during the interval when they were out of possession. The present plaintiffs can point to nothing which can serve in any way to prove that it was advanced while they were in possession; and the date at which the conveyance of the 2 annas to Rash Monee and Apoosheebuttee was effected falls certainly in the interval during which they were admittedly out of possession of their husband's property. In view of these facts, we think we cannot make the presumption which the plaintiffs ask us to make. We cannot presume that money advanced by these ladies during the interval when they were not in the enjoyment of their husband's property, was necessarily part of the proceeds of that property, kept unspent since the time when they had it. The facts of the present case are materially different from those of the case reported in VIII Sevestre, page 708,* to which we have been referred. As has already been said, we do not go so far as the Subordinate Judge in thinking that it is actually proved that the properties were acquired by the ladies with their own exclusive funds. All that we say is that the plaintiffs have failed to satisfy us that this property was part of the property which originally belonged to Radha Nath or ought to be treated as if it was so. The burden lies upon them of proving this, although, of course, they have the right in so doing to claim the aid of all presumptions of fact which naturally arise out of and

* 2 W. R., *Civil*, 327.

Digitized by Google

which ought to be made from the facts which are proved.

On the whole, then, we think that the plaintiffs are entitled in this suit to recover the 4 annas 15 gundahs share which was in the hands of Rash Monee and Apoosheebuttee. In all other respects their suit fails.

The decree of the Lower Court must be varied according to our finding, and we think that the appellants must have their costs of this appeal.

As there is no appeal on the other side against the finding of the Lower Court with respect to wassilat, we think the appellants ought to have Rs. 83-6 for wassilat up to the date of the suit. They are also entitled to wassilat for the period subsequent to the suit until delivery of possession to them by the defendants in respect of the whole of the property decreed. The amount will be ascertained in execution.

The 17th December 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Execution Proceedings—Judgment-Debtor's Representatives.

Miscellaneous Appeals from an order passed by the Subordinate Judge of Shahabad, dated the 11th July 1874.

Cases Nos. 221 and 228 of 1874.

Ram Bhunjun Singh (one of the Judgment-debtors) *Appellant,*

versus

Mussamut Munder Koer and another (Decree-holders) *Respondents.*

Mr. M. M. Ghose and *Baboos Taruck Nath Palit* and *Mohesh Chunder Chowdhry* for Appellant.

Mr. C. Gregory and *Moonshee Mahomed Yusoof* for Respondents.

Cases Nos. 349 and 406 of 1874.

Sheo Sahoy Pandey and others (Decree-holders) *Appellants,*

versus

Ram Bhunjun Singh and others (Judgment-debtors) *Respondents.*

Mr. C. Gregory and *Moonshee Mahomed Yusoof* for Appellants.

No one for Respondents.

Where the sons of a deceased judgment-debtor, whose estate is declared by the decree to be liable to sale, are admitted on the record as his representatives, they are not entitled, in the execution stage, to re-open the whole case, and to ask for a decision as to whether the debt incurred by the father was not for the benefit of the estate, or was in some other way invalid under the Hindoo law and not binding on the joint family.

Kemp, J.—THESE appeals have been argued separately, but one judgment only will be delivered in the four cases which will govern others. In appeals Nos. 228 and 221, one of the heirs of the original judgment-debtor Dewan Ram Jeebun Singh,—namely, his son Ram Bhunjun Singh, is the appellant; and in appeals Nos. 349 and 406, the decree-holders are the appellants. In No. 349 Sheo Sahoy Pandey is the decree-holder, appellant; and in No. 406 Mussamut Munder Koer, who has purchased the rights of the original decree-holder Achumbeet, is the appellant. The decree of Achumbeet is dated the 30th of January 1866, and the decree obtained by Sheo Sahoy Pandey is dated the 28th February 1867. Both decrees are against Dewan Ram Jeebun Singh, the father of Ram Bhunjun Singh and Ram Kumul Singh. We are informed that one of the sons of Dewan Ram Jeebun Singh,—namely, Ram Kumul Singh,—has settled with the judgment-creditor. The appeals Nos. 228 and 221 are, therefore, on behalf of one only of the sons of Dewan Ram Jeebun Singh,—namely, Ram Bhunjun Singh. The original decree of the 30th of January 1866 was on a mortgage bond, and that decree declares that the properties hypothecated were liable to be sold. The decree of the 28th of February 1867 is on the same terms, and it is these decrees in their entirety that the decree-holders, appellants in appeals Nos. 349 and 406, are seeking to execute. The judgment-debtor raised several objections in the Court below:—1st, that Mussamut Munder Koer was the furzee of the decree-holder, and that the Court ought to go into the question of fraud; and further that the Court ought to inquire into the nature of the debt contracted by Ram Jeebun Singh, and to see whether it was not one for immoral purposes or for purposes not valid under the Hindoo law and not for legal necessity. The Subordinate Judge, in the first instance, rejected the application of the judgment-debtor, and directed the execution to proceed. Subsequently, on review, he modified his decision, and directed that the two-third share of the two sons of Dewan Ram Jeebun Singh be exempted from sale, and that the one-third share of Dewan Ram Jeebun Singh, the father, be sold in satisfaction of the decree.

Digitized by Google

The judgment-debtor appeals to this Court on the ground that nothing can be sold, not even the one-third share of the father, until an investigation is made as to whether the debt is one for which the family can be made liable as contracted for the benefit of the joint family, and that the Subordinate Judge is wrong in finding that a division had taken place.

In the appeals of the decree-holders, the question raised is that the Subordinate Judge ought to have directed the sale not of one-third of the property, but of the whole of the property, and it is also urged in the grounds of appeal that the decree-holders were not parties to the alleged partition, and that that partition, if it ever took place, was brought about after the decrees obtained by the decree-holders, which declare that the mortgaged properties are liable in satisfaction of the lien of the decree-holders.

In this case the grounds, as raised by the judgment-debtor, are entirely inconsistent with his contention in the Court below. They allege in this Court that no separation whatever has taken place between them and their father. The Subordinate Judge's decretal order as it at present stands is also incapable of execution, for in his judgment he finds that Ram Bhunjun Singh's share of one-third has been divided off, and that the remaining shares of two-thirds are still held jointly by the other son Ram Kumul and his father Ram Jeebun Dewan; and yet in a case of this kind he directs that the decrees are to be executed by the sale of the separate share of Ram Jeebun Singh, which he defines to be one-third of the property. Such a decretal order would be incapable of execution. But we think it unnecessary in this case to decide whether the partition has taken place or not, as the judgment-debtor in his grounds of appeal, as already observed, states that no separation of any kind has taken place. The decree-holders in their grounds of appeal state that they were no parties to the separation if it did take place, and that such separation would not in any way restrict their rights under the original decrees, inasmuch as it took place after those decrees which declare that they were entitled to sell the mortgaged property in satisfaction of the judgment-debt. We hold that the judgment-debtors are the representatives of their father, the original judgment-debtor Dewan Ram Jeebun Singh: in that capacity they have been admitted on the record, and these execution proceedings are being carried on on that footing; and they are not entitled in the execution stage to re-open the whole case which was decided as between the decree-holders and their father, and to ask for a decision in this stage of the case on the questions, namely, whether the debt incurred by the father was not for the benefit of the estate, or was in some other way invalid under the Hindoo law and cannot bind the joint family. We, therefore, amend the decision of the Subordinate Judge, and direct execution to proceed on the terms of the original decree against the whole estate, and not as against one-third as directed by the Subordinate Judge. The appeals of the judgment-debtors, Nos. 228 and 221, will be dismissed with costs; and the appeals of the judgment-creditors, Nos. 349 and 406, upon which the decree of the Subordinate Judge has been amended, will be decreed with costs.

Pleaders' fees two gold mohurs in each case.

The 21st December 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp, Louis S. Jackson, J. B. Phear, and W. Ainslie, *Judges.*

Time-expired Decree—Evidence.

Case No. 76 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Tipperah, dated the 19th September 1873, reversing a decision of the Moonsiff of Noornuggur, dated the 30th April 1873.

Maharajah Beer Chunder Manick Bahadoor (Plaintiff) *Appellant,*

versus

Ram Kishen Shaw and others (Defendants) *Respondents.*

Baboo Doorga Mohun Doss for Appellant.

Baboo Huree Mohun Chuckerbutty for Respondents.

Digitized by Google

A decree is admissible as evidence even if it has become inoperative from not having been executed within the period of limitation.

This case was referred to the Full Bench by Couch, C.J., and Ainslie, J., with the following remarks :—

Couch, C.J.—THIS is a suit for rent for 1279 F.S., the plaintiff having obtained an exparte decree against the defendant for Rs. 75-8-8 for rent on account of 1278 F. S. This decree had not been executed within three years, and it was contended that it could not be used as evidence of the rate of rent which the defendant was liable to pay. The Moonsiff held that it could, and made a decree for the plaintiff. This has been reversed on appeal, the Officiating Judge saying :—"As no steps were "taken to execute the decree of 1278 F. S., "and the period of limitation was allowed "to elapse, it became inoperative and can no "more be held alive for the purposes of "evidence than to establish a debt for the "rent of 1278 F. S." This judgment is supported by a case in X Weekly Reporter, page 215; and as we differ from that decision, we refer this appeal for the decision of a Full Bench, the point being whether the decree could be used as evidence.

The judgment of the Full Bench was delivered as follows by—

Couch, C.J.—We are of opinion that the decree is admissible in evidence. The question of its value, when admitted, is to be determined by the Lower Courts. The defendant has alleged that it was obtained fraudulently. It does not appear that he gave any evidence of this, and it will be for the Court to say whether there is any evidence in support of that allegation. The decree of the Officiating Judge must be reversed, and the suit must be remanded to him for re-hearing. The costs will follow the result.

The case decided by the Full Bench at Agra which was referred to by the pleader for the respondent, does not appear to us to be applicable.

The 21st December 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Decree—Arrangement (Kistbundee)—Execution—Jurisdiction.

Case No. 340 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Beerbhoom, dated the 21st May 1874, *affirming an order of the Officiating Subordinate Judge of that district, dated the 9th January* 1874.

Ram Runjun Chuckerbutty (Decree-holder) *Appellant,*

versus

Rajah Jowhurujumah Khan (Judgment-Debtor) *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Tarucknath Sen for Respondent.

The parties to a decree have no right to execute it upon the footing of a subsequent arrangement (kistbundee) which makes a substantial alteration in the terms of the decree; but must execute, if at all, the original decree itself.

According to law, no Court has power to execute a decree upon the footing of such a kistbundee.

Markby, J.—IT seems to us that the decision of the Lower Appellate Court was in point of law correct. The application was to execute a decree, passed in 1849, against the father of the judgment-debtor, upon the footing of an arrangement, entered into after the father's death, during the minority of the judgment-debtor, by his mother and guardian. It appears that that arrangement was

Digitized by Google

consented to by her on behalf of her son; that the vakeels of both parties appeared before the Court and presented a petition, stating the terms of the arrangement; and that the only order passed upon that was that it might be kept with the record. That kistbundee, as it is called, made a substantial alteration in the terms of the original decree. Now it has been argued that the consequence of that proceeding was to give the parties a right to execute the decree in accordance with the kistbundee, and a decision has been referred to, which, no doubt, does strengthen that proposition. But that decision, which is reported in the 11th Weekly Reporter, page 86, is, in our opinion, directly overruled by the decision in the 13th Weekly Reporter, Full Bench Rulings, page 44. The question there was whether the effect of a kistbundee could lengthen the period of limitation. The Chief Justice in his referring order, says:—"Some cases have been decided in which it "has been held that a kistbundee, filed with "the consent of the Court, has the effect of "altering the time for payment under the "decree. But for these cases I should have "thought that a Court of execution was "bound to execute the decree as it found it, "and was not justified in adding to, or in any "way altering, the terms of the original "decree, in consequence of any consent of "the parties. That is my present impres-"sion." Then, amongst the cases which the Chief Justice there refers to, was this very one in the 11th Weekly Reporter, page 86. Mr. Justice Mitter says on that occasion that he has already expressed his opinion on this subject in the case reported in the XI Weekly Reporter, page 86, to which he adheres. The case was then referred to the Full Bench, consisting of five Judges; and Mr. Justice Mitter adhered to his former opinion. The Chief Justice, in expressing his opinion and of the other three Judges, says:—"It is contended that this kistbundee "was binding because it was registered in "the Court of execution; but the Court of "execution had no power to alter the law of "limitation, or to enlarge the time for "executing the decree to the 14th July "1868." It is quite clear that the reason of that is, that the Court could not, or rather did not, by registering the kistbundee, import those terms into the decree. It seems to us, therefore, that this is an authority by which we are bound; that the parties had no right to execute this decree upon the footing of the kistbundee, but that they must execute, if at all, the original decree itself.

Then another decision has been referred to in the 21st Weekly Reporter, page 310. Now the decision of the Full Bench is not referred to in the judgment there given, but we must assume that the learned Judges considered that that case was distinguishable from the Full Bench decision upon the ground there stated. The Full Bench decision not being referred to, its authority must remain untouched by that judgment. The ground upon which that case was decided was this, that the Judge in the Lower Appellate Court had found as a fact that the parties,—that is, both the judgment-debtor and the judgment-creditor,—had treated and acted upon the kistbundee as if it had become part of the decree. The Judge below having found that, the Court thought that the judgment-debtor was precluded from taking the objection that the kistbundee could not be executed. But that distinction does not arise in this case, because here, on the other hand, it is found as a fact by the Court below, and of course that finding is binding upon us in special appeal, that the present judgment-debtor had paid under compulsion, having objected to do so until ordered by the Court. Therefore, that case in the 21st Weekly Reporter is wholly distinguishable from this, and there is nothing to distinguish this case from the Full Bench decision to which we have already referred.

The only other point which it is necessary to notice is this:—It is said that the judgment-debtor not having appeared, this objection ought not to have been taken by the Court. But it appears to us that it is one which the Court was bound to notice. The Court was asked to execute the kistbundee, or rather the decree upon the footing of the kistbundee. The Full Bench decision is a distinct authority that, according to law, the Court has no power so to do. Therefore, if there were any circumstances under which this case could be taken out of the Full Bench decision, it was for the judgment-creditor, who sought to execute his decree in this manner, to show what those circumstances were. He attempted to do so, but the Court below found that he had failed.

For these reasons, we think that the judgment of the Court below was right, and that this special appeal ought to be dismissed with costs.

Digitized by Google

The 21st December 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Conveyance—Delivery—Registration—Usage.

Case No. 962 of 1874.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 14th February 1874, *affirming a decision of the Moonsiff of Jehanabad, dated the 29th November* 1873.

Gunga Huree Nundee and another (Defendants) *Appellants,*

versus

Raghub Ram Nundee (Plaintiff) *Respondent.*

Baboo Rash Beharee Ghose for Appellants.

Baboos Kishen Komul Bhuttacharjee and *Gooroo Doss Banerjee* for Respondent.

The general rule in India is that, upon a contract of purchase and sale, the ownership is acquired by the purchaser, though the transaction has not been followed by delivery of possession; delivery not being necessary to complete the title of the vendee.

As a general rule of law when the vendee has got, not a mere contract to convey, but a conveyance, that is to say, a document which in terms professes to make over the property, and the document is registered, he becomes at once the owner without further ceremony.

By Hindoo law, a well-defined usage acquires the force of law.

Markby, J.—In this case three persons being in possession of property as a joint Hindoo family, two out of that number ejected the third.

Whilst the third member was out of possession, he sold his share in a specified portion of the property to the plaintiff who brought his suit for possession against the other co-sharers.

Both the Lower Courts gave the plaintiff a decree.

The only objection taken in special appeal which appeared to us necessary to reserve for consideration was this,—that as by the plaintiff's own admission, his vendor was out of possession when the conveyance was executed, the plaintiff could not make a valid title to the property in dispute under a document which had not been followed or accompanied by possession.

This in substance raises the very broad and general question whether upon a contract of sale and purchase delivery of the possession of the thing sold is necessary to complete the title of the vendee.

There seems never to have been any suggestion that under Mahomedan law delivery is necessary to the transfer of ownership of either moveable or immoveable property except in the case of gifts. So by the Common Law of England, it is not necessary in the case of a sale of moveables: and though it was at one time necessary in the case of immoveable under the Statute of Uses, it is no longer so. The only question can be whether under Hindoo law there is any difference in this respect.

It would no doubt lead to considerable inconvenience if the law upon such a subject varied with the religion of the parties to the transaction: and upon the whole I think the general rule has been adopted in India that in the case of purchase and sale the ownership is acquired by the purchaser, though the transaction has not been followed by delivery.

That this is the accepted law of India is, I think, shown by the Registration Acts. In the first place the existence of a system of registration *primâ facie* suggests that ownership is acquired without delivery. The reasons for the rule which has so widely prevailed requiring delivery for the transfer of ownership are not of one simple character. Whether, however, this ceremony was required, because taking place in public, it carried with it the consent of the community to which the parties belonged; or because taking place before an officer of justice, it carried the consent of the State; or simply because the transaction is one which ought to be notorious and open, so that all persons may know when it takes place (all of which influences have at one time or other affected and can still be traced on it), it has almost every where been supplanted by registration, and scarcely any where retained concurrently with registration.

Moreover, if we look at the special provisions of the Indian Registration Act, I think it will be seen that the framers of it contem-

Digitized by Google

plated, not a condition of the law in which delivery was rigorously required, but a condition of the law in which ownership both of moveables and immoveables was frequently transferred without delivery. The view taken in the Act seems to be the ordinary English view that a document executed by the parties may operate not only as a contract but as a conveyance: and the general object of the Act seems to be to require that such documents should be registered in order to have that operation. It may not be impossible to look upon the Act as providing for a registration of contracts only, and not of titles. But if so, a great deal of the language of the Act would be superfluous and unmeaning. Throughout Part X of the last Registration Act, the Act seems to contemplate that the document, if registered, will "take effect" (which must I think mean "will operate as a conveyance") as soon as executed, if the requirements as to registration have been fulfilled. It is true that a certain advantage is given to a purchaser who has obtained delivery, but that does not show that such a purchaser had this advantage independently of the Act. It rather points the other way.

The conclusion, therefore, at which I should arrive is that by the law of this country delivery is not generally necessary for a transfer of ownership: but it was contended that there are certain recent cases in which a contrary proposition has been laid down.

The first of these is the case reported in XII Moore's Indian Appeals, page 275.* The Privy Council in that case commenting on a judgment of the Sudder Court use these words which have since been so often referred to:—"They" (the Judges of the Sudder Court) "seem to have ruled that the effect of "the execution of a bill of sale by a Hindoo "vendor is, to use the phraseology of English "law, to pass an estate irrespectively of "actual delivery of possession; giving to the "instrument the effect of a conveyance "operating by the Statute of Uses. Whether "such a conclusion would be warranted in any "case is, in their Lordships' opinion, very "questionable. It is certainly not supported "by the two cases cited in the judgment "under review; in both of which actual "possession seems to have passed from the "vendor to the purchaser. To support it, "the execution of the bill of sale must be "treated as a constructive transfer of posses-"sion. But how can there be any such "transfer, actual or constructive, upon a "contract under which the vendor sells that "of which he has not possession, and to "which he may never establish a title? "The bill of sale in such a case can only be "evidence of a contract to be performed *in* "*futuro*, and upon the happening of a "contingency; of which the purchaser may "claim a specific performance if he comes "into Court showing that he has himself "done all that he was bound to do."

If this passage be taken alone, it cannot be denied that the doubt here expressed goes to the full extent of raising the question whether "*in any case*" the ownership could be acquired without delivery. Nor can it be for a moment contested that these observations are unimpeachable in theory. They represent the views which have prevailed amongst lawyers generally in some shape until displaced by legislation or recognized practice. But nevertheless it must be borne in mind that they have been in fact so displaced to a very large extent. And I feel confident that the Privy Council did not intend to exclude the consideration of the question whether under the actual Hindoo law delivery was still necessary, because they do not either directly or indirectly decide the question thus raised: the decision of the case did not in any way involve as a proposition of law that delivery was in all cases necessary to a transfer of ownership.

The next case is reported in XVIII Weekly Reporter, page 140, and is also a decision of the Privy Council. The passage above quoted is quoted by the Privy Council from their former decision, and it must, therefore, be taken that the same doubt is reiterated: but the decision was given with reference to the particular provisions of the document then in question, upon the construction of which it appears to have been held that it did not operate as a conveyance.

The remaining case is a decision of this Court reported in XX Weekly Reporter, page 446. But the main ground of that decision was that the transaction then under consideration was contrary to public policy: it does not decide the question which the Privy Council had left in doubt.

As far as I am aware this is the first time the Court has been called upon directly to decide this question; and upon the whole, not feeling myself prohibited by the doubt expressed by the Privy Council, I feel bound still to say that in my opinion delivery has not been considered generally necessary to

* 12 W. R., P. C., 6.

Digitized by Google

the transfer of ownership by Hindoos in this country.

Of course, there may be cases in which from the nature of the transaction it is plain that the ownership was not intended to be transferred immediately, but only at some future time or under some condition : it may also, when a question arises as to which out of two honest purchasers has the better title, be important to consider who has got the possession. Upon this I say nothing. But, as a general rule of law, I consider that when the vendee has got not a mere contract to convey—but (as is admitted to be the case here)—a conveyance, that is to say, a document which in terms professes to make over the property, and the document is registered (in case registration be necessary). he becomes at once the owner without further ceremony.

I may add that the decision in XI Weekly Reporter, page 80, seems to me to be in accordance with this view.

The special appeal is dismissed with costs.

Mitter, J.—I concur in this conclusion. It was pressed upon us that according to Hindoo law delivery of possession is essentially necessary to render the title by sale complete, and it was contended that without it, a purchaser does not become the owner of the property sold. As far as I am aware there is no provision in the shasters which can be quoted in support of this contention. On the other hand, the following passage from the Mitakshara to be found in Macnaghten's Hindoo Law, pages 218 & 219, goes a great way against it. It runs thus :—"The "acceptance of gold, cloths, &c., being com- "pleted by the ceremony of bestowing water, "and falling, therefore, under either of the "means, may be designated as a three-fold "acceptance ; but in the case of land, as there "can be no corporeal acceptance without "enjoyment of the produce, it must be accom- "panied by some little possession, otherwise "the gift, sale or other transfer is not com- "plete. A title, therefore, without corporeal "acceptance, consisting of the enjoyment of "the produce, *is weaker than a title accom- "panied by it, or with such corporeal accept- "ance. But such is the case only, when of "these two the priority is undistinguishable : "but when it is ascertained which is "first in point of date, and which posterior, "then the simple prior title affords the "stronger evidence;* or the interpretation "may be as follows :—'Evidence is said to "consist of documents, possession, and wit- "nesses.'* This having been premised as "the general rule ; the text 'A title is more "powerful than possession unaccompanied by "hereditary succession,' and 'where there "is not the least possession, there a title is "not sufficient, †' *have been propounded to "point out to which the superiority belongs,* "where the three descriptions of evidence "meet : as for instance, in the case of the "first acquirer, if a title be proved by wit- "nesses, it is of greater weight than posses- "sion unaccompanied by hereditary succession. "Again, possession accompanied by hereditary "succession vested in the fourth descendant, "is more weighty than a title proved by "documents ; but in the case of an interme- "diate (claimant) a title accompanied with "even a small degree of possession is better "than a title destitute of possession. ‡ This "has been expressly declared by Nareda :— "'For the first, gift is a cause ; for an inter- "mediate (claimant) possession with a title ; "but long and hereditary possession alone is "also a good cause."'

From the above quotation, it is evident that the title of a purchaser without delivery of possession is complete, although the holder of it labors under certain disadvantages as against a person who acquires a title accompanied by possession. There are also numerous texts in the Hindoo law laying down that a well-defined usage acquires the force of law. And as far as my experience goes, I may state that the conclusion at which we have arrived is entirely in accordance which the usage that now obtains amongst the people of the country. I desire also to add that our view in this matter is not only supported by the provisions of the Registration Act as shown by my learned colleague, but also by Section 259 of the Civil Procedure Code, which lays down that after "a sale of immoveable property shall have "become absolute in manner aforesaid, the "Court shall grant a certificate to the person "who may have been declared the purchaser "at such sale to the effect that he has pur- "chased the right title and interest of the "defendant in the property sold, and *such "certificate shall be taken and deemed to "be a valid transfer of such right title "and interest.*"

* Catyáyana, cited in the Smritichandrica.
† Veeramitrodaya.
‡ See Blackstone on this subject, Vol. ii, p. 197, note.

Digitized by Google

The 22nd December 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Zemindaree and Shikmee—Co-sharers—Set-off.

Case No. 656 of 1874.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 23rd December 1873, affirming a decision of the Additional Subordinate Judge of that district, dated the 5th December 1872.

Huree Kishore Roy and others (some of the Plaintiffs) *Appellants,*

versus

Hur Kishore Adhikaree (one of the Defendants) *Respondent.*

Baboos Doorga Mohun Doss and *Huree Mohun Chuckerbutty* for Appellants.

Baboos Hem Chunder Banerjee and *Nil Madhub Sen* for Respondent.

Plaintiffs, as being entitled collectively to 11-anna share of the jumma of a talook, and alleging that they had obtained such portion of their share as the 14-anna talookdars were liable for, sued the 2-anna sharer for what he ought to have contributed. The Lower Appellate Court, finding that the defendant had a 2-anna share in the zemindaree, as well as in the shikmee, considered that the one right might be set-off against the other, and that the plaintiffs had consequently no claim against the defendant:

HELD that this conclusion was erroneous, for though there were in a certain sense opposing rights, still they were not mutual rights as between the parties to the present suit. The plaintiffs were entitled to get a 2-anna share of the jumma from the defendant and the 14-anna talookdars jointly, and the defendant was entitled to get a like share from these 14-anna talookdars and himself jointly, but the defendant had no right to set-off the debt thus due to him against the debt due to the plaintiffs from the same persons.

Phear, J.—THE plaintiffs in this case sue as being entitled collectively to 11-anna share of the jumma payable in respect of a certain talook. And the principal defendant Hur Kishore Adhikaree is the owner of a 2-anna share in the talook. The plaintiffs say that they have obtained the amount of their share of the rent for which the 14-anna talookdars, *i.e.*, all the shareholders in the talook except the principal defendant, are liable, and that the latter refuses to pay them the remaining 2-anna share which he ought to contribute towards the rent.

Several objections are made by the defendant to this suit. The first appears to be to the effect that the plaintiffs are not entitled to sue jointly. The second that the suit is barred by the statute of limitation. There is only one essential issue upon the merits, namely, whether the plaintiffs are entitled to get from the defendant the "compensation and rent" which they seek.

The Lower Appellate Court has determined the two first issues in favor of the plaintiffs, but has arrived at the conclusion that the plaintiffs are not entitled to recover from the defendant the 2-anna share of the zemindar's rent for which the suit is brought.

It appears to be an admitted fact that the defendant is a 2-anna sharer in the same zemindaree as the plaintiffs. And the Judge has placed the case thus:—"The respondent "in respect of his two annas of the zemin- "daree would have as much right to sue in "respect of the shikmee rights of the 14- "anna shareholders as the appellant, and "this they admit, but the peculiar position "of the defendant is owing to the circum- "stance which the appellants seem well "enough to have borne in mind in 1275, but "which they now ignore, that the defendant "possesses precisely equal rights in both the "zemindaree and the shikmee, *i.e.*, a 2-anna "share of each."

And upon this ground the Judge considers that the one right may be, so to speak, set-off against the other right, and that consequently the plaintiffs have got no claim against the defendant. This conclusion seems to us erroneous, because although there are in a certain sense these opposing rights, still these are not mutual rights as between the parties to the present suit. The plaintiffs are entitled to recover from the defendant and the remaining 14-anna sharers in the talook, who are not parties to the present suit, an 11-anna share of the jumma payable in respect of the talook. They say that they have been paid by the 14-anna talookdars all that these 14-anna talookdars are as amongst themselves, bound to contribute towards this 11-anna portion of the jumma. And if so, there still remains due to them 2-anna share of the same portion. Probably, it would be right to say that they are entitled

Digitized by Google

to recover this from the 14-anna shareholders, as well as from the defendant, or rather, that they are entitled to recover this from the 14-anna shareholders jointly with the defendant. If they did so, that is, if they did recover it from all these persons jointly, then inasmuch as the 14-anna shareholders have already paid all that they are bound to contribute towards the rent, the defendant must be obliged in the end to recoup or make good to his co-sharers this 2-anna portion, unless for some reason as between themselves he is only liable for some less share. In other words, as the matter now stands between the plaintiffs and the defendant, the latter is bound to pay to the former a 2-anna portion of the rent which the plaintiffs are admittedly entitled to receive in respect of the talook, although at the same time the defendant's co-sharers may be jointly liable with him to pay the same.

It is true, on the other land, that the defendant as a 2-anna shareholder in the zemindaree is entitled to be paid a 2-anna share of the rent due in respect of the talook, but he is not entitled to have this paid him by the plaintiffs: he is entitled to get it from the 14-anna shareholders in the talook who have already paid to the plaintiffs their share and from himself jointly. Thus the plaintiffs are entitled to get a 2-anna share of the rent from the defendant and the other 14-anna talookdars jointly; and the defendant is entitled to get a like share of the rent from these 14-anna talookdars and himself jointly; but obviously the defendant has no right to set-off the debt due to him from the 14-anna talookdars and himself against the debt due to the plaintiffs from the same persons.

The view taken by the Judge seems to us inaccurate. And the fact that the defendant is a 2-anna shareholder in the zemindaree does not in any degree affect the right of the plaintiffs to recover from the defendant that amount which he ought to contribute towards the portion of the zemindaree rent which is payable to them, that is, as admitted by the defendant himself, 2-anna share of 11-anna of the entire talookdaree jumma.

It might have been questioned whether the defendant was liable to be sued for this amount separately from the other co-sharers of the talook. But he does not appear to have made an objection of this kind in either of the Courts below. And we think it is too late for him now to do so on special appeal.

The issue as to limitation was decided by the Lower Appellate Court in favor of the plaintiff for the following reason:—

"As regards the objection that the suit is "barred, because the claim was for arrears "beyond three years, it is sufficient to say that "it being determined above that the suit "would lie under the provisions of Act VIII "of 1859, the question of limitation is to "be decided under Act XIV of 1859, and "not under Act VIII of 1869, and it is "within time."

Assuming for the moment that the Judge is right in his view that the question of limitation is to be decided under Act XIV of 1859, we still think the period of limitation which is prescribed by that Act is three years, and not more as the Judge seems to think. The decision of the Privy Council which is reported in XIX Weekly Reporter, page 5, puts it beyond doubt that the words of Clause 8 Section 1 Act XIV of 1859 apply to agricultural land, as well as any other form of land. and are not qualified by the preceding words of the Section. So that if the special limitation of Act VIII of 1869 does not apply to the case, still Clause 8 Section 1 Act XIV of 1859 will prescribe a period of three years. On the other hand, if this case is one which falls within the special limitation clause, Section 29 Act VIII of 1869, the same period of limitation is prescribed, namely, three years. The only difference between the two Sections is that in the one the time is reckoned from the actual date when the cause of action accrued; in the other it is reckoned from the end of the year, according to local style, in which the cause of action accrued. But inasmuch as in the present case the arrears of rent are assumed to have become due at the end of the year, the effect of the two Clauses is precisely the same.

We are, therefore, of opinion that the Judge was in error in holding that the plaintiff had more than three years limitation for the purpose of bringing this suit.

It seems that the parties are at issue with regard to the question what is the jumma assessed on this talook, and the Lower Appellate Court does not appear to have dealt with this matter in its judgment.

We are, on the whole, of opinion that the decision of the Lower Appellate Court must be reversed, and the case remanded to that Court for re-trial upon that issue, *i.e.*, upon the issue as to the amount of rent. And in this trial the plaintiffs' claim must be restricted to arrears of rent which became due within the period of three years immediately preceding the date of suit.

We think that the appellant ought to have his costs of this appeal.

Digitized by Google

The 4th January 1875.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble Charles Pontifex, *Judge.*

High Court, Original Jurisdiction—Practice—Appeal—Paper Books.

Hurrosoondery Dossee, *Appellant,*

versus

Cally Puddo Dutt, *Respondent.*

No one for Appellant.

Mr. Lowe for Respondent.

In an appeal case, in which the appellant failed to deliver the paper books, and was not represented by Counsel at the appeal, and the respondent, who had the option of delivering the paper books under a rule of Court, did not do so, the Court, on the appeal being called on, dismissed the appeal without costs, although the respondent appeared at the hearing by Counsel.

Couch, C.J. (*Pontifex, J,* concurring).—In this case no one appears for the appellant, and paper books have not been delivered. The learned Counsel for the respondent asks that the appeal may be dismissed with costs. The 49th* of the rules of the High Court of Judicature, Original Jurisdiction, provides, that if the appellant does not deliver the paper book, the respondent may do so. But the respondent has not done so, and therefore the appeal will be dismissed without costs.

* This rule runs as follows:—

When an appeal is preferred from a decree of the High Court, Original Jurisdiction, to the High Court, Appellate Jurisdiction, the appellant or his attorney shall, within six days from the presentation of the memorandum of appeal, deliver to the Registrar, Original Jurisdiction, for the use of the Judges, two paper books, containing a copy of the plaint, written statement, depositions of witnesses, and of the decree and judgment and memorandum of appeal. The respondent or his attorney may deliver such paper books, if the appellant or his attorney shall fail to deliver the same within the time limited.

The 4th January 1875.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble Charles Pontifex, *Judge.*

Small Cause Court, Calcutta—Act XXVI of 1864 *ss.* 7 *&* 8*—Security—Breach of Warranty—Contract—Right of Action.*

Case stated for the opinion of the High Court in its Ordinary Original Civil Jurisdiction under Section 7 *of Act XXVI of* 1864, *by Mr. G. S. Fagan,* 1*st Judge of the Court of Small Causes at Calcutta.*

C. Fornaro and others, *Plaintiffs,*

versus

Sookdeb and others, *Defendants.*

Mr. Macrae for Plaintiffs.

Mr. Branson for Defendants.

A case should not be sent to the High Court under the provisions of Act XXVI of 1864 ss. 7 & 8, until the party against whom judgment is given has given the security there mentioned; and it is the duty of the Small Cause Court before sending the case to see that the security is given.

In a suit for compensation for breach of warranty, where the dispute was, whether the goods tendered (shellac) were according to the contract, it appeared that a sample had been taken by plaintiff's sircar, and referred to the selling broker to decide whether the goods from which it had been taken ought to be accepted, and he decided that they should be taken at one rupee per maund less than the contract rate, which award the parties agreed to abide by. The sircar then went to the godown of the defendants, thoroughly examined the undelivered shellac, and removed it to the godown of the plaintiffs:

Held, that after this the parties could not be allowed to raise the question whether there had been a breach of that contract, and to ask for damages by reason of the goods not being of the quality contracted for.

Case.—This is a suit in which the plaintiffs abandoned Rs. 120 and sued for Rs. 1,000 under the last Clause of Section 118 of the Indian Contract Act, for compensation for loss caused by breach of warranty in a contract. "For that the defendants sold to the "plaintiffs forty-two chests of shellac by "sample, the bulk of which, on delivery, was "inferior in value to the said sample, where-"by the plaintiffs have sustained damages to "the amount stated, abandoning an excess "of Rs. 114 and all other excess."

The facts were as follows:—

The plaintiffs, on the 4th June last, entered with the defendants into the contract marked A, and the shellac tendered under it being considered not up to sample, the plaintiffs, with

Digitized by Google

the consent of the defendants, referred the matter (with a sample which their sircar had taken from the goods tendered) to the selling brokers, who decided the goods tendered should be accepted by the plaintiffs with an allowance of one rupee per maund. This award was accepted by both parties, and on the 9th June the sircar of the plaintiffs went to the godown of the defendants, thoroughly examined the undelivered shellac, and removed it to the godown of the plaintiffs. On the 10th of June the plaintiffs wrote to the defendants the letter marked B, and on the same day received from them the letter marked C. On the 15th June, by consent, the reference marked C2 was made, and on the 18th the award marked D was delivered. The reference is to two firms, and the award is made by only one individual member of each of those firms: but the plaintiffs made no objection on this head. One of the arbitrators gave verbal notice to one of the plaintiffs that the arbitration would be held on a day named. The plaintiffs did not attend. That arbitrator then called, personally and alone, on plaintiff Charles Fornaro, and heard from him his view of his case, and received from him all the papers connected with it. The plaintiffs never attended the arbitration, and never even saw the other arbitrator. On the 23rd June the plaintiffs paid up the amount awarded, accompanying the payment with the letter marked H.

It was contended for the plaintiffs that the award ought to be set aside as a bad award, on the grounds, 1st, that the arbitrators had not decided the matter referred to them; 2nd, that one arbitrator had derived all his knowledge of the plaintiffs' case at second-hand from the other arbitrator; and that that other arbitrator had himself not heard the plaintiffs' case in the presence of the defendants.

I held that the matter referred being "the dispute about the 42 cases," the arbitrators had really decided the real issue in it, and that they might well have gathered that issue from the private communications of plaintiff C. Fornaro to one of them, and of the other party to both, as well as from the correspondence which was before them. I hold that the proceedings of the arbitrators were irregular, but that the irregularities were not such as it lay in the plaintiffs' mouth to complain of. I therefore held the award good, and as such, a bar to the present suit.

I also held that the present suit could not be entertained, as, under Section 118 of the Indian Contract Act, a reasonable notice of the intention to claim compensation is requisite; and I considered that delivery having been given on the 8th, and no notice till the 23rd, the interval of 15 days was not a reasonable time. I accordingly dismissed the case subject to the opinion of the High Court upon the four following points, demanded by the plaintiffs.

I would mention, however, with regard to question 2nd that I do not consider that the evidence showed that the plaintiffs agreed to take such shellac at rupee one a maund, but that they agreed to take the shellac of which they produced what after examination they put forward as a fair and average sample.

1. On the evidence before the Court—Is the award made by Messrs. Haworth and Nosworthy in this matter a bar to this suit?

2. Are the plaintiffs, by having drawn sample from the bulk and submitted it to the broker as such for his opinion as to its quality and agreed to take such shellac at rupee one a maund less than the contract rate, estopped from afterwards setting up against the defendants that the bulk on delivery did not correspond with the selling, or such second sample?

3. Are the plaintiffs, by having, after the award, paid the defendants the full price of the goods under protest, and without prejudice to their rights to compensation for breach of warranty as to quality, estopped from recovering such compensation?

4. Did the plaintiffs give such notice to the defendants of their intention to seek compensation for the breach of warranty and within such reasonable time as to entitle the plaintiffs to sue for compensation?

No costs of reference have been paid into this Court as security under Section 8 of Act XXVI of 1864.

When the case was on the board of the High Court, the 1st Judge of the Small Cause Court forwarded the following memorandum to the High Court:—

I certify that the plaintiffs tendered yesterday the sum of Rs. 230 as security for costs of reference in the case of Fornaro *v.* Ramnarain Sookdeb, and that I refused to accept the same as being offered too late. I give this certificate, because in the year 1869, in the case of B. Clarke *v.* Agra Bank, an opinion was hesitatingly expressed by Mr. Justice Phear that the deposit of security for costs was not a condition precedent to this Court's granting a reference, but there have subsequently,—*viz.*, in the cases of Rajcoomar Poramanic *v.* L. Steward, and Dissent *v.* The

Digitized by Google

Justices of the Peace for the Town of Calcutta*—been contrary decisions by the High Court, from which it would appear that that Court is finally of opinion that it has no jurisdiction over a reference until after the conditions stated in Section 8 of Act XXVI of 1864 have been first complied with, and because it has always seemed to me that the effect of the word "forthwith" was to render the prior deposit of security for costs imperative, and it would save the time of both Courts if it were distinctly ruled that under such circumstances cases should not be referred.

The following is the judgment of the High Court:—

Couch, C.J.—This case is referred to this Court under the provisions of the 7th and 8th Sections of Act XXVI of 1864. The 7th Section obliges the Small Cause Court, in a suit of an amount exceeding Rs. 500, to reserve for the opinion of the High Court any question of law or equity or any question as to the admission or rejection of any evidence as to which the Court shall entertain any doubt, or which they shall be requested by either party to the suit to reserve; and the 8th Section provides that when judgment is given contingent upon the opinion of the High Court, the party against whom the judgment is given shall, unless willing to submit to such judgment, forthwith give security for the costs of the reference and for the amount of the judgment. It was I think clearly the intention of the Legislature that the case should not be sent to this Court until the party against whom judgment was given had given the security here mentioned. Unless he did so he was to be taken as submitting to the judgment, and it was the duty of the Small Cause Court, before sending the case to this Court, to see that the security was given.

In the present instance, this was not done. The first Judge of the Small Cause Court states the case, and causes it to be sent to this Court, appending to it a note that no costs of reference had been paid into his Court as security under Section 8 of Act XXVI of 1864.

What was his object in making this note is not clear; whether he intended, as possibly he did, from what appears in the certificate that he afterwards gave, to have it decided by this Court what was the effect of not giving the security, there being, as he thought, some conflict of opinion; or to call the attention of this Court to the fact that security had not been given so that proper measures might be taken to enforce its being given is not quite apparent. But he ought, instead of sending the case in this manner, to have kept it until the security was given, and if it was not given within a time which came within the definition of the word "forthwith" he ought not to have sent up the case.

As I have already said, instead of doing that, the Judge of the Small Cause Court has sent the case to this Court. And we have also received from him a certificate that the plaintiffs, on the 16th of December, tendered Rs. 230 as a security for the costs of the reference, and that he refused to accept it as being offered too late.

Having sent the case to us I am not certain that he had power to accept the security, even if he had thought fit to do so, and that he had not by his conduct placed the matter in the hands of this Court. By sending the case as he did, the plaintiffs may have been prejudiced and led to suppose that it would be sufficient if they gave the security at any time; that the Judge of the Small Cause Court had shown that the direction that the security should be given was not to be insisted upon. From what he had done, it might be inferred that the plaintiffs did not submit to the judgment, and that the case was to be determined by the opinion of this Court. And this went on for a considerable time, until apparently it came to be understood by the plaintiffs, or their advisers, that the security had not been given, and that there was thus a difficulty in the way of the case being heard, when they immediately offered the money. If the security be given now, the defendants will not be prejudiced by the delay. They will be in the same position as regards the having security for the costs as they would have been in if it had been first given. If there should be any question of allowance of interest or as to costs, we can take into consideration the delay which there has been in the plaintiffs' giving security. On looking at the manner in which this case has been dealt with by the Judge of the Small Cause Court, we thought that it was a case in which we ought to allow the plaintiffs to appear and argue the case upon the security being now given, which was done to the satisfaction of the defendants' Counsel.

We have, therefore, to consider how we shall answer the questions which have been referred to us by the first Judge. It is not necessary that we should answer all of them.

* 20 W. R., 349.

Digitized by Google

It is enough for us to answer the questions the answer to which will determine the suit; and in giving our answer we must look only at the facts which are stated by the Judge.

He says the suit was one for compensation for loss caused by breach of warranty in a contract between the plaintiffs and the defendants; and that the facts are as follows:—"The plaintiffs, on the 4th June last, entered with the defendants into the contract marked A, and the shellac tendered under it being considered not up to sample, the plaintiffs, with the consent of the defendants, referred the matter (with a sample which their sircar had taken from the goods tendered) to the selling brokers, who decided the goods tendered should be accepted by the plaintiffs with an allowance of one rupee per maund."

We will for the present stop here. There was a dispute between the parties as to whether the goods which were tendered were according to the contract of the 4th June. A sample had been taken by, as I understand, the plaintiffs' sircar, and not the defendants', from the goods which were tendered, and it was referred to the selling broker to decide whether the goods from which the sample had been taken ought to be accepted; and he decided that an allowance of one rupee per maund should be made, and that with that allowance the plaintiffs were to take the goods.

I think that if the matter had rested here, the plaintiffs would not be at liberty afterwards to bring a suit for a breach of warranty. Apparently they, the plaintiffs, had an opportunity of taking samples of the goods which were tendered in any manner they thought fit. And subject to its being shown that there had been any fraud, it must be taken that the sample was a fair one. It was submitted as such to the broker. Under these circumstances, I think that the broker's decision ought to bind the parties.

But it did not rest there. The case goes on to state that "on the 8th of June the sircar of the plaintiffs went to the godown of the defendants, thoroughly examined the undelivered shellac, and removed it to the godown of the plaintiffs." This was after the decision of the broker. The plaintiffs had an opportunity of examining the goods, and of seeing whether the sample which had been submitted to the broker was a fair representative of the bulk of the shellac. As is stated in this case, and we must assume truly, their sircar thoroughly examined it, and then it was received into their godown. After that, I think the parties cannot be allowed to raise the question whether there was a breach of the contract, and to ask for damages by reason of the goods not being of the quality contracted for. This finding substantially answers the second question put to us by the Judge of the Small Cause Court, namely, "Are the plaintiffs, by having drawn sample from the bulk and submitted it to the broker as such for his opinion as to its quality and agreed to take such shellac at rupee one a maund less than the contract rates, estopped from afterwards setting up against the defendants that the bulk on delivery did not correspond with the selling, or such second sample?" I think we should answer this in the affirmative, and the consequence of our doing so is that the defendants are entitled to the judgment which has been given by the Judge of the Small Cause Court. That judgment will stand, and the defendants will have the costs of reserving the question and the costs consequent thereon. The sum deposited will be retained to satisfy them.

The 4th January 1875.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble Charles Pontifex, *Judge*.

Demurrage—Contract.

Case stated for the opinion of the High Court in its Ordinary Original Civil Jurisdiction, under Section 7 of Act XXVI of 1864, by Mr. G. S. Fagan, 1st Judge of the Court of Small Causes at Calcutta.

Gillanders Arbuthnot & Co., *Plaintiffs*,

versus

Obhoy Churn Nundy, *Defendants*.

Mr. Collis for Plaintiffs.

Mr. Branson for Defendant.

Where a purchaser engaged to take delivery of cargo from a ship at a certain rate *per diem*, and, in the event of failure, to pay demurrage, and the contract contained a stipulation in the following terms:—"But should the Captain be unable to deliver weighment of the goods on account of the lightness of the vessel to which I have no objection, but would not hold myself liable for any demurrage,"—

HELD, that, according to a reasonable construction of the contract, if delay took place in unloading, demurrage was to cease so long as the delay was caused by the

Digitized by Google

inability of the Captain to deliver the goods; not that the matter was to be thereby set at large, and that there was no longer to be any period under the contract within which delivery was to be taken of the cargo.

Case.—THE plaintiffs sued to recover Rs. 1,000, after abandoning all excess, for money payable by the defendant to them for the demurrage of the ship "Edward Percy," and for money due by the defendant to them as demurrage for the breach by the defendant of a contract entered into by him with them on the 16th February 1874.

The defendant denied that the contract was as alleged; denied that he had notice as alleged on 26th February; denied that the plaintiffs were ready and willing to deliver; and pleaded that, besides the Sundays allowed by the plaintiffs for not working, there were also three native holidays.

The particulars of the plaintiffs' demand were that they claimed for eight days, *viz.*, the 24th, 25th, 26th, 27th, 30th, and 31st March, and the 1st and 2nd April 1874, at Rs. 200 a day.

I found upon the evidence in the case that the contract between the parties was contained in the baiana chitty, marked A, a translation as well as the original of which is forwarded herewith.*

The vessel entered the Custom House on the 19th February. The delivery was completed on the 2nd April. In the interval between these two dates, a period of 42 days elapsed. But by the terms of the contract, A, the defendant, was entitled to 22 days for taking delivery of 1,101 tons, at 50 tons a day. Five Sundays intervened, and I held the defendant entitled to the benefit of these.

There were moreover three native holidays, for which also I gave defendant credit, and for four days, *viz.*, the 16th, 17th, 18th, and 19th March, defendant was prevented from discharging salt by the Captain of the ship, on the ground that such discharge could not go on with safety to the ship. These figures put together amount to only 34 days. There was no evidence of any other unreadiness or unwillingness on the part of the plaintiffs or the ship. I therefore held that as the defendant had occupied 42 days in taking delivery, when he was only entitled to 34, the plaintiffs were entitled to a judgment to the sum they sued for, which only amounts to the demurrage due to them at the stipulated rate for five days.

My judgment was, however, delivered contingent on the opinion of the High Court on the following point, which it was demanded that I should reserve.

I have now the honor to request the opinion of the Honorable the Judges upon it.

Whether, under the terms of the Bengalee baiana chitty, which has been held to contain the terms of the contract between the plaintiffs and the defendant, the defendant is liable to pay any demurrage to the plaintiffs, it being found as a fact that the defendant was for four days, to wit, on the 16th, 17th, 18th, and 19th days of March 1874, prevented from discharging the said salt by the plaintiffs, or their agent the Captain of the said ship, on the ground that such discharging of the said cargo, if proceeded with, would endanger the said ship, and that the said cargo could not be permitted to be further discharged until the said ship should take in certain cargo as stiffening, whereby the plaintiffs wrongfully detained the said cargo on board, and became themselves the persons who detained the said ship?

The sum of Rs. 230 has been paid into this Court as security under Section 8 of Act XXVI of 1864.

Judgment of the High Court.

Couch, C.J. — I think the reasonable construction of this contract is that if the Captain was unable to deliver the goods on account of the lightness of the vessel, the demurrage was not to be paid for so long a time as he was unable; and if the fact was that, in consequence of the peculiar mode of unloading the vessel, some time would have to be allowed for getting the boats again, that would be included in the demurrage. All that was intended here, according to a reasonable construction of the

---

* Letter of Abhoy Churn Nundy, of Hantkhola, dated 5th Falgoon 1280, corresponding with 16th February 1874.

SREE ABHOY CHURN NUNDY, by Parbutty Churn Roy, *Broker*.

Purchased of Baboos Gobin Chand Dass and Kally Dass Seal 1,101 tons of Liverpool salt, more or less, to arrive in the firm of Messrs. Gillanders Arbuthnot and Co., per ship *Edward Percy*, exclusive of duty, but including dustoory, at the rate of Rs. 113-8 per 100 maunds, delivery to be taken from the next day to that when the vessel entered in the Custom House at the rate of 50 tons a day, until the whole cargo is cleared off. But should I fail to do so, then I shall pay demurrage at the rate of Rs. 200 per day. But should the Captain be unable to deliver weighment of the goods on account of the lightness of the vessel to which I have no objection, but would not hold myself liable for any demurrage.

Under these conditions bargain is made, for which Rs. 1,001 is put down as earnest-money.

Digitized by Google

contract, is that the demurrage was to cease for so long as the delay in unloading was caused by the inability of the Captain to deliver the goods. The construction which Mr. Branson contended for would, I think, be an unreasonable one,—namely, that if any time during the period allowed for unloading, the Captain became unable to deliver the goods on account of the lightness of the vessel, the matter was set at large, and there was no longer to be any period under the contract within which delivery was to be taken of the cargo. I think the judgment which has been given by the Judge of the Small Cause Court should stand, and the defendant will pay the costs of reserving the question and consequent thereon.

The 5th Janury 1875.

Present:

The Hon'ble Romesh Chunder Mitter, *Judge.*

Hindoo Law—Joint Family—Presumption —Onus Probandi.

Case No. 833 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 29th January 1874, *affirming a decision of the Moonsiff of Serampore, dated the 20th August* 1874.

Prosunno Moyee *alias* Thako Monee Dossee (Plaintiff) *Appellant,*

versus

Wooma Churn Deb and another (two of the Defendants) *Respondents.*

Baboos Bhowanee Churn Dutt, Nullit Chunder Sen, and *Rajendronath Bose* for Appellant.

Baboo Chundernath Bose for Respondents.

The presumption that a Hindoo family is joint in food, worship, and estate may be rebutted, and where this is done the onus is thrown on the opposite side.

In this case the only ground taken is that the Lower Courts were in error in throwing the onus of proof upon the plaintiff, because the presumption of Hindoo law is that a Hindoo family is joint in food, worship, and estate. No doubt, the presumption of Hindoo law is what is stated. But it is a presumption which can be rebutted, and in this case the Lower Appellate Court has held that upon the testimony of Juggur Nath, one of the witnesses for the plaintiff (and in fact the person from whom the plaintiff derives her title), that presumption is rebutted. Juggur Nath in his deposition says that the property was purchased with separate funds belonging to himself and his brother Kashee Nath. Therefore, clearly his statement rebuts the presumption that the purchase was made from the joint funds of the family. That being so, the plaintiff who states that the purchase was made jointly by Juggur Nath and Kashee Nath, like all other ordinary cases in which the allegation of joint purchase is made, must make out her allegation before she can succeed in this suit, and both the Courts below have held that the plaintiff has failed to establish the case set up by her.

The special appeal is, therefore, dismissed with costs.

The 5th January 1875.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Proof (or Disproof) of Bona Fides—Onus Probandi.

Appeal under Section XV of the Letters Patent from a decision passed by the Hon'ble F. B. Kemp, one of the Judges of this Court, dated the 9th September 1874, *in Special Appeal No.* 279 *of* 1874, *from the decision of the Deputy Commissioner and Subordinate Judge of Gowalparah, dated the 10th November* 1873, *affirming a decision of the Extra Assistant Commissioner of that district, dated the 19th August* 1873.

Roop Ram Doss (Defendant) *Appellant,*

versus

Saseeram Nath Kurmokar (Plaintiff) *Respondent.*

Baboo Grija Sunkur Mojoomdar for Appellant.

Baboo Gopal Lall Mitter for Respondent.

In a suit to have a purchase made at an execution sale set aside on the ground that it was not *bonâ fide*

Digitized by Google

but collusive, the burden of proof is upon the plaintiff, and it is not sufficient for him only to show circumstances which create a suspicion of the *bona fides* of the transaction. But in a suit for possession of land and for a declaration of plaintiff's title by virtue of purchase, it is not sufficient for him to produce a deed executed by a judgment-debtor: the plaintiff must free his case of such suspicions as may arise from his own position with reference to the vendor and from any such circumstance as the improbability of such a purchase having been made.

The judgment appealed from was as follows:—

THE grounds of special appeal in this case are that the Lower Appellate Court is wrong in law in presuming fraud on mere suspicion without any legal grounds or legal testimony. The objections taken in this case are precisely the objections which were raised by the decision of their Lordships of the Privy Council in the case quoted by the pleader for the special appellant, to be found in Moore's Reports, Volume XI.* Their Lordships say that the Courts should take care that their decisions rest not on suspicion, but on legal grounds established by legal testimony. Now in this case the Courts below have found the purchase by the plaintiff to be bad on mere suspicion.

The grounds are, 1st, that the plaintiff was the godfather of the judgment-debtor; 2nd, that the plaintiff's son-in-law was the go-between at the sale; and 3rd, that the property is one of small extent; that there was no apparent reason for the plaintiff wishing to buy it; that it is at a considerable distance from the plaintiff's house; and that the money was first paid and then the deed drawn up. None of these grounds are grounds for setting aside a sale; they are at the best only grounds for suspicion as to the transaction not being a valid one; and as the first Court has found on the evidence that the deed of conveyance was executed, that the consideration passed, and that the plaintiff is in possession through a ryot, I think the Lower Appellate Court's decision must be reversed, and this appeal and the plaintiff's suit decreed with costs. Pleader's fees one gold mohur.

The judgment of the Appellate Bench was delivered as follows by—

Couch, C.J.—This suit was instituted to obtain possession of certain lands, and for a declaration of the plaintiff's right thereto by virtue of a purchase by him from the owner of them.

The defendant's case is that the property, the subject of the suit, belonged to his judgment-debtor, and had been taken in execution of a decree.

The issue which was framed was "is it true that the plaintiff purchased the land and thatch in dispute from the judgment-debtor, Manpoora Katary, and that he holds the same, or that the said property is still owned by the judgment-debtor as his right, and the kobala and sale and purchase contained therein is the effect of collusion?"

The Extra Assistant Commissioner, after stating what appeared from the evidence of the witnesses, namely, that the kobala of the property in dispute was executed in Gowalparah, that the consideration-money had been paid and received at Singazally previous to the execution of the kobala, and that the plaintiff was in possession by a ryot, says:—

"It is now necessary to see whether the sale "and purchase alluded to by the plaintiff "and his possession were *bonâ fide* transac- "tions, or whether they were the effect of "collusion with the judgment-debtor. On "the grounds enumerated below, I hold that "the purchase stated by the plaintiff was the "effect of collusion. It has been proved "from the evidence of the brother-in-law of "the aforesaid Manpoora, as well as from the "evidence of the son of his wife's former "husband, that the plaintiff is the godfather "of the said Manpoora. It is, therefore, pro- "bable that the kobala has been executed in "order to protect the rights of the judgment- "debtor.

2nd.—"The son-in-law of the plaintiff "resided for a short time at Singazally, and "the execution of the kobala in the name of "the plaintiff after payment and receipt of "money through the said man is a mark of "collusion.

3rd.—"There was no reason why the con- "sideration-money was paid and received "beforehand, and not at the time in which "the kobala was executed or at any time "subsequent to it, and no necessity could be "seen which might urge the plaintiff to buy "such a small property.

4th.—"The land in dispute is two prohur's "journey from the house of the plaintiff or "more than that; but no reason can be "assigned why the plaintiff chose to purchase "the judgment-debtor's property lying at "such a distance, and comprising 9 annas of "land only, with his dwelling-house thereon.

* 7 W. R., P. C., 10.

Digitized by Google

5th.—"As one of the witnesses examined "by the defendant is the son of the judg- "ment-debtor, and another is his sister's "husband, and as the right and possession of "the judgment-debtor have been deposed to "by them, the evidence of these men as "against the judgment-debtor must be held to "be sufficient. It being proved that the "plaintiff and the judgment-debtor have "colluded with each other, no reliance can "be placed on the evidence produced by the "plaintiff. It being thus found that the "plaintiff's claim is not based on good "grounds, the case is ordered to be dismissed."

The Deputy Commissioner, upon the appeal from this judgment, says:—"I have "carefully considered the evidence adduced "on both sides in this case, and also heard "the arguments of the pleaders on both "sides. There can be no doubt, I think, "that the alleged sale of the land was but "a make-shift, and nothing more than an at- "tempt to prevent the attachment and sale "of the property. The facts of the "so-called sale having been effected in "the mofussil while the deed was effected "some days afterwards at Gowalparah, and "dated only the day before the suit was insti- "tuted, are alone sufficiently suspicious to cast "doubt on the validity of the document. "Moreover, the plaintiff (appellant) raised "objection at the time the land was attached "and this was directed (*sic*) added to this "time is the circumstance that plaintiff is "in some way connected with or at least "interested in the party against whom the "attachment issued, and it is unlikely too "that the plaintiff, a resident of Gowalparah, "should purchase an insignificant plot of "land at such a distance, he not having, I "believe, purchased in the neighbourhood. "On the whole, I cannot think otherwise "than that this has been an attempt to evade "the process of the Court, and concurring "in the decision of the Extra Assistant "Commissioner, I dismiss the appeal with "costs."

What these two Judges have held is that the plaintiff, who had to establish the validity of the deed and to prove that he had purchased from the judgment-debtor, gave evidence which they thought was insufficient having regard to the various circumstances that appeared in the case. The circumstances to which they alluded were such as they might fairly take into consideration in estimating whether the evidence of the plaintiff was sufficient or not to satisfy the burden of proof which lay upon him.

There was a special appeal from the judgment of the Deputy Commissioner, and the learned Judge before whom it came considered that the judgment of the Judicial Committee of the Privy Council was applicable to the case, and that what is there stated about a decision of a Court not being allowed to rest on suspicion only applied to this case. Consequently, he reversed the decisions of both the Lower Courts.

The case in the Privy Council is different from the present. It is in reality the converse of it. There the plaintiff was not seeking to establish a purchase, but he brought a suit to have a purchase which had been made at a sale in execution of a decree set aside on the ground that it was not a *bonâ fide* one, and that it had been made in collusion with the judgment-debtors. The burden of proof that the purchase was not *bonâ fide* was upon him. Here, the burden of proof is upon the plaintiff. He has to show that he had actually purchased; and in order to do this, it was not enough for him to produce the deed executed by the judgment-debtor. It was necessary for him to satisfy the Court that it was a real transaction. In the case before the Judicial Committee, which is in XI Moore's Indian Appeals, page 28,* the plaintiff, seeking to impeach the validity of the purchase which gave a title to the defendant and to have it set aside, gave what was in the opinion of their Lordships' evidence which only raised a suspicion, and their Lordships (the case coming before them not as a special appeal, but as cases do come before them, one to be heard and decided as upon a regular appeal) said:—"Undoubtedly, there are "in the evidence circumstances which may "create suspicion, and doubt may be enter- "tained with regard to the truth of the "case made by the appellant; but in matters "of this description it is essential to take "care that the decision of the Court rests "not upon suspicion, but upon legal grounds "established by legal testimony." And Lord Westbury, who delivered the judgment, says immediately before this passage that the affirmative lay upon the respondent, that is, upon the plaintiff in that case, and that he was to prove his case.

It is obvious that what is said there by

* 7 W. R., P. C., 10.

Digitized by Google

the Judicial Committee had reference to the affirmative being upon the plaintiff and his showing only circumstances which might create a suspicion of the *bona fides* of the transaction. This, their Lordships said, was not sufficient; and so the Courts would constantly say. A man who seeks to set aside a deed which has been acted upon, and by virtue of which the defendant is in possession, must show some thing more than circumstances of suspicion. But that is not the case which is now before us. Here, the plaintiff, in order to obtain possession from the defendant, must show that he really purchased the land, that there was a real purchase, and not merely a colorable transaction. Both the Courts have said, and we think fairly, that it is true that certain witnesses are produced, and it is shown that a deed was executed, and evidence has been given of an apparent payment and a consideration for it, but looking at the other circumstances they cannot depend upon the evidence; they think that it is not evidence that can be trusted having regard to the circumstances which appear in the case. There is nothing there which is opposed to the judgment of the Judicial Committee, and it is a usual and proper way of dealing with a case of this kind. A man who has to establish that a purchase by him is a real transaction must free his case of such suspicions as may arise from his own position with reference to the party from whom he is said to purchase and from any circumstance such as the Judges allude to, namely, the improbability of such a purchase having been made. We cannot see that this is a case in which the Lower Courts took an erroneous view of the manner in which they ought to consider the evidence, or that there has been any error on their part in deciding what was a question for them to decide, namely, whether there was in fact the purchase upon which the plaintiff founded his title to recover the property. They have both found that there was no such purchase, and that what appeared to be a purchase was not one in reality, but only a collusive transaction between the plaintiff and the judgment-debtor.

Therefore, the decree appealed against must be reversed, and the special appeal be dismissed with costs, including the costs of the appeal to us.

The 5th January 1875.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Special Appeal.

Appeal under Section XV of the Letters Patent from a decision passed by the Hon'ble F. B. Kemp, one of the Judges of this Court, on the 28th August 1874, *in Special Appeal No.* 67 *of* 1874* *from a decision of the Judge of Jessore, dated the* 21*st November* 1873, *reversing a decision of the Additional Moonsiff of Nurail, dated the* 30*th June* 1873.

Tara Prosunno Mojoomdar (one of the Plaintiffs) *Appellant,*

versus

Bishonath Sircar (Defendant) *Respondent.*

Baboo Rash Beharee Ghose for Appellant.

Baboo Motee Lall Mookerjee for Respondent.

Where the first Court and the Lower Appellate Court differ as to questions of fact, it is not open to the parties in a special appeal to argue whether the former was right or the latter.

Couch, C.J.—THIS suit was brought for arrears of rent at an enhanced rate after notice, and the Moonsiff who tried it laid down as the issues, first, whether the suit could proceed without joining the defendant's co-sharer, Pran Nath Sircar, as a defendant; secondly, whether the notice was duly served upon the defendant, and whether the grounds mentioned in that notice are sufficient grounds for enhancement; thirdly, whether the *kaimee* pottah filed by the defendant was genuine; fourthly, whether the rate of rent paid by the defendant had been uniform from the time of the permanent settlement; fifthly, whether the rate of

---

* 22 W. R., 482.

Digitized by Google

rent paid by the defendant was below or above the prevailing rate payable by the same class of ryots for land of a similar description and with similar advantages in the places adjacent, and what is the rate of rent paid by the latter; and, sixthly, what is the quantity of land held by the defendant.

Having decided upon the first issue that the suit could proceed without joining Pran Nath Sircar, the Moonsiff disposed of the second issue by finding that the notice had not been duly served under Section 14 of Act VIII (B. C.) of 1869, and upon the third he found that the kaimee pottah set up by the defendant was genuine. We need not notice the reasons which he gave for these findings. Then saying that it was not necessary for him to decide the other issues, he ordered the suit to be dismissed with costs.

The District Judge, upon the appeal from this decision coming before him for hearing, held that the service of the notice was sufficient. He then proceeded to consider the question of the genuineness of the pottah. He said:—"The Moonsiff holds "this to be a genuine document, but I am "unable to concur with him on this point.

"The paper on which it is written has "the peculiar soft feel that is apparent in "so many of the forged documents in use in "this district, and the detached way in "which the words have been formed and "the lightness with which the pen has been "used show that the paper was in its pre-"sent state when the document was written.

"The only evidence to prove its genuine-"ness is that of the defendant Bisho Nath "and Hurish Chunder Sircar, the nephew "of defendant's vendor Nil Monee, and all "that they say is that when Nil Monee sold "the property, he gave this pottah to the "purchaser.

"Now, as the purchaser Brojo Nath only "purchased 4 annas of the land covered by "the pottah, it seems improbable that Nil "Monee would have given up the pottah to "him, and I therefore do not think the evi-"dence of these witnesses is to be depended "on."

He, therefore, upon what is purely a question of fact—whether the pottah is genuine or not—found that the witnesses whom the defendants had produced for the purpose of proving it were not to be depended upon, and upon that he held that the pottah was not genuine. He says, I am unable to agree with the Moonsiff on this point, namely, that the pottah was genuine. What he says about the peculiar feel of the paper is not of much importance, for putting that aside, if he disbelieved the evidence of the witnesses who were called to prove the pottah, he was justified in finding that it was not a genuine deed. He means that it was not proved to his satisfaction.

From this decision there was a special appeal, and the learned Judge who heard it, considered the two questions whether a notice had been served and whether the pottah was genuine.

We need not consider the case as to the notice. The learned Judge, after referring to the evidence, says that any thing more unsatisfactory than the evidence as to service of the notice it is impossible to conceive. He then proceeds to say that as the Moonsiff had gone into the merits, the case came under the ruling of this Court in Nuffer Chunder Paul Chowdhry *versus* Poulson, decided on the 24th of January 1873, and reported in XIX Weekly Reporter, page 175, in which it was held that in a suit for arrears of rent at enhanced rates, when the liability of the tenure to enhancement has been put in issue and fully tried, a decree may be given declaring the tenure liable to enhancement, though service of notice to enhance is not proved. For this reason the learned Judge considered the other question whether the pottah was genuine, and he concluded his judgment by saying,—"I think the pottah is a genuine document, and concurring in the decision of the Moonsiff, I decree this appeal."

In this case the questions being solely questions of fact, *viz.*, whether a notice was duly served and whether the pottah relied upon by the defendant had been proved by him to be a genuine one, there was no question which could be raised in a special appeal. It was not open to the parties in a special appeal to argue whether the Moonsiff was right in his finding upon these questions, or whether the Judge was right. The judgment of Mr. Lawford upon the proof of the pottah is decisive. He may have taken an erroneous view, but he says in the most distinct terms.—I do not think that the evidence of the witnesses is to be depended upon.

From such a judgment as this, we think it has been long settled that a special appeal does not lie. The decision of the learned Judge which is appealed from to us must be reversed, and the special appeal dismissed with costs, including the costs of this hearing.

Digitized by Google

The 6th January 1875.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble Charles Pontifex, *Judge*.

Indian Contract Act (IX of 1872) ss. 27 & 29—Restraint of Trade—Uncertainty.

Case stated for the opinion of the High Court in its Ordinary Original Civil Jurisdiction under Section 55 of Act IX of 1850, by Mr. G. S. Fagan, 1st Judge of the Court of Small Causes at Calcutta.

E. G. Buskin, *Plaintiff*,

versus

Ramkissen Seal, *Defendant*.

Mr. Macrae for Plaintiff.

Mr. R. Allen for Defendant.

Plaintiff, who was a broker, agreed to give up an admitted claim to brokerage on 2,000 corahs previously disposed of, in consideration of defendant, who was a commission agent for different kinds of goods, employing him to sell a like quantity of other corahs and all his other goods for the future, employing plaintiff alone as his broker for the sale of his goods. It was also agreed that if defendant did not sell the second batch of corahs through plaintiff, the brokerage on the whole would be payable by defendant:

HELD that the agreement was not void either as being in restraint of trade or for uncertainty.

Case.—THE plaintiff proved that he is a broker, carrying on business in Calcutta, and that, about the 27th of April 1874, the defendant came to him and asked him to sell for the defendant certain goods, namely, dressed corahs; but, as the usual remuneration of Rs. 2 per corge for selling such goods was so small and the trouble so great, the plaintiff did not at first care to take up the business. After some conversation, however, between the parties, the plaintiff specially agreed with the defendant, that, in consideration of the defendant promising that he would sell all his corahs and other goods through the plaintiff alone, the plaintiff would agree to sell certain 2,000 pieces of dressed corahs for the defendant as his broker; and accordingly the goods were delivered to him for sale, on the 27th of April, the 29th of April, 1st May, 26th May and 27th May, but on the 4th of June all the goods were at the defendant's request returned, with the exception of some samples, without any sale having been effected, although various offers had been made, as the defendant wanted a price not obtainable in the bazar for his 2,000 pieces of corahs. Subsequently, the corahs were shipped to London by the defendant through Messrs. Gisborne & Co.

On the 5th June the defendant came to the plaintiff and admitted that he was liable to pay the 2 per cent. per corge brokerage on the said 2,000 pieces; but the plaintiff, on such admission, agreed to give up his claim for brokerage on the said 2,000 pieces of dressed corahs shipped through Messrs. Gisborne & Co., in consideration of the defendant employing the plaintiff to sell certain 2,000 pieces of *R. D. A.* dressed corahs which the defendant then had for sale, and all his other goods, and for the future employing the plaintiff alone as his broker for the sale of his goods. It was also agreed that if the defendant did not sell the 2,000 R. D. A. dressed corahs through the plaintiff, the brokerage on the whole 4,000 pieces would be paid to the plaintiff by the defendant.

It was also proved at the trial that the defendant is a commission agent who has goods consigned to him for sale, and that he carries on business in dressed corahs of various kinds, R. D. A. dressed corahs, piece goods, raw silks, tussers, and loose corahs and other goods.

It was further proved that on Saturday, the 11th June, the plaintiff obtained from Messrs. Ede and Hobson an offer of Rs. 120 for one of the lots of corahs, and of Rs. 105 for the other, and submitted them to the defendant. The defendant, however, refused to accept these offers, but, having in the meantime, discovered the source from which they emanated, sold the corahs on Monday, the 13th June, to the same purchasers, at the same rates, through his own sircar.

I considered that though the plaintiff had not actually sold any of the goods entrusted to him for sale, still he was entitled to his brokerage as to 2,000 corahs under the first-mentioned contract of the 27th April last; and as to the whole 4,000 corahs, under the last-mentioned contract of the 5th June; he having been prevented from selling only by the negligence of the defendant and his unwillingness and default in refusing, for the mere sake of saving the brokerage charge, to permit the plaintiff to carry out the sale.

It was contended for the defendant that the contract of the 5th June, as well as the preceding contract of the 27th April, were both void under the 27th Section of the Indian Contract Act, as being in restraint of

Digitized by Google

trade; and also under the 29th Section as being vague and uncertain. It appeared to me that, under these contracts, no one was restrained in the exercise of his trade; not the plaintiff, because they enlarged rather than restricted him in the exercise of his trade; not the defendant, because though they might restrict him in the choice of the instruments through whom he should carry on his trade, they did not restrict him in the exercise of the trade itself. I thought also that the contracts were sufficiently certain to be maintained. I have been asked, however, to refer these two points for the opinion of the High Court, and as such contracts are not infrequent, and it seems important to determine to what extent the new state of the law created under the 27th Section of the Contract Act is to be carried, I have consented to do so, and in delivering my judgment in favor of the plaintiff for Rs. 400 with costs, made it contingent on the opinion of the High Court on those two points, and a third which seems a corollary to them.

The questions upon which the opinion of the High Court is desired, are—

First, whether, upon the above state of facts, the agreement first entered into between the plaintiff and the defendant is void, and being in restraint of trade under Section 27 of the Contract Act IX of 1872, and whether the second agreement of the 5th day of June 1874 is void for the same reason.

Secondly, whether both the said agreements are void under Section 29 of the Contract Act for uncertainty; and

Thirdly, whether, if the contract of the 5th June be held to be void, either as in restraint of trade or for want of certainty, such holding would have any such effect as to prevent the plaintiff from reverting, with regard to the latter 2,000 corahs (those marked R. D. A.) to his ordinary right as a broker to receive commission for work which he was ready and willing to perform, but had been prevented from performing by the mere default or fraud of his principal.

The costs of reference in this case have not yet been paid into Court, but the parties have promised to deposit the same on Monday.

Judgment of the High Court.

Couch, C. J.—Upon the facts stated, the agreements are not void either as being in restraint of trade or for uncertainty, and the judgment that was given contingent upon the opinion of this Court will stand. The plaintiff will have the costs of reserving the case and consequent thereon.

I think it right to remark that it is stated at the end of the case that "the costs of reserving the case have not yet been paid into Court, but that the parties have promised to deposit the same on Monday." The case ought not to have been sent to this Court until the money had been deposited.

The 26th November 1874.

Present:

The Hon'ble L. S. Jackson and W. F. McDonell, *Judges.*

Ex parte Judgment—Appeal—Act VIII of 1859 s. 119.

In the matter of
Luckhee Monee Dossee, *Petitioner,*

versus

Bhoobun Mohun Bose, *Opposite Party.*

Baboo Amarendro Nath Chatterjee for Petitioner.

Mr. J. S. Rochfort and *Tarucknath Palit* for Opposite Party.

Where an *ex parte* judgment has been set aside and a judgment afterwards come to on trial, and where a regular appeal is preferred, the Appellate Court may, amongst the matters urged in appeal, take into consideration the regularity of the proceedings of the Court below in making an order under Act VIII of 1859, s. 119. But a District Judge is not competent to entertain a summary or miscellaneous appeal from an order setting aside an *ex parte* judgment.

Jackson, J.—We are of opinion that this rule must be made absolute. The Moonsiff made an *ex parte* decree in favor of the plaintiff, and subsequently on application by the defendant "being," as he says, "not at "all convinced that the notice of attachment "or sale was duly served", and consequently being satisfied that the defendant had no notice of the proceedings against her, he ordered that the *ex parte* decision be set aside and the case heard *de novo*. Thereupon the plaintiff appealed at once from that order to the District Judge, and the District Judge hearing the appeal observes that the first question he had to try was whether he had jurisdiction to try the appeal. He refers to the terms of Section 119 of the Civil Procedure Code, and goes on to say:—"It must be certain that the order itself "is a legal one, that is, an order passed "with jurisdiction; otherwise an order might

Digitized by Google

"be obtained on an application preferred "months or years after the decree had been "executed. I therefore hold on the au- "thority, VI Weekly Reporter, page 300, "that as the application in the present case "was made after the time prescribed in "Section 119, the Moonsiff had no jurisdiction "in the case, and his order setting aside the "judgment is open to appeal."

Now it is to be observed that in matters of this kind, by Section 119, an appeal is expressly taken away where the Court passes an order under this Section for setting aside a judgment. We have been referred, in addition to the case cited by the Judge, to a case decided in our own Bench in April last, XXII Weekly Reporter, page 5. and to a case in XV Weekly Reporter, page 175. In both the later cases the question arose upon a regular appeal in which the Lower Appellate Court had or might have taken into consideration, amongst the matters raised in appeal, the propriety of the order of the first Court admitting a case to re-hearing, and in the case in XXII Weekly Reporter, we pointed out the ground on which we thought an order of that kind was open to consideration by the Appellate Court. In the case in XV Weekly Reporter, it is no doubt broadly laid down that an appeal will lie from an order setting aside an *ex parte* judgment, if the order has been made without jurisdiction, or if the application was admitted after the prescribed time, but that statement purports to be made on the authority of the case in VI Weekly Reporter, page 300, and it is in fact the head-note affixed to the case by Mr. Sutherland.* That so called report is merely a copy of the judgment delivered by the Judges of this Court with a note purporting to contain the substance of that judgment, which note is very frequently far from correct. It is quite incorrect in the present case, because on referring to the paper-book of Special Appeal, No. 1781 of 1866, the facts appear to be these. The Court of first instance set aside the *ex parte* judgment and went on to try the case *de novo*, and on appeal the Subordinate Judge observes:—"As the "appellants had no right of appeal against "this miscellaneous order, its justness or "otherwise cannot be discussed in this appeal "on the facts of a regular suit." Now it was to this observation of the Subordinate Judge that the Judges addressed themselves in special appeal. They differed from him upon that particular matter and considered that the subject was open to consideration in a regular appeal. Where an inferior Court makes an order against which an appeal is not allowed, the High Court has power by Section 15 of the High Court's Act to deal with an order made without jurisdiction, or, in some cases, it has been held, where the order has been improperly made, but no such power is given to the District Courts. It might be, therefore, that on application to the High Court, an order setting aside an *ex parte* judgment might be set aside, but the District Judge would not be competent to take any such step, and there is no authority in any of the cases decided in this Court showing that the District Judge is competent to entertain a summary or miscellaneous appeal from an order setting aside an *ex parte* judgment. Cases do show that where an *ex parte* judgment has been set aside, and a judgment afterwards come to on trial, and where a regular appeal is preferred, the Appellate Court may, amongst the matters urged in appeal, take into consideration the regularity of the proceedings of the Court below in making an order under Section 119. That is all that the District Court could have done in the present case, and that which it has done is irregular and must be set aside. Of course, if this matter should come again in appeal before the District Judge, as it is likely that it should, he must take care to

* The statement which was made in the judgment in XV Weekly Reporter, delivered by Kemp and Glover, JJ., and which is said to be "in fact the head-note affixed to the case" reported in VI W. R., p. 300, is reproduced below in juxtaposition with the head-note. It will be seen that the construction put upon the judgment in VI W. R. by the Hon'ble Judges who constituted the Division Bench named in XV W. R., is identical with the construction put upon it by Mr. Sutherland.

Head-note to the judgment reported in VI W. R., p. 300.

"An appeal will lie from an order of the Lower Court admitting an application made (after the time allowed by law) for an order to set aside an *ex parte* decree under Section 119, Act VIII of 1859."

Ruling by the Division Bench in Case No. 1701 in XV W. R., pp. 175 and 176.

"An appeal will lie against an order setting aside an *ex parte* judgment under Section 119, if the order has been made without jurisdiction, or where an application has been admitted after the prescribed time. Volume VI Weekly Reporter, p. 30."

It is not in the province of a Reporter to pronounce upon the correctness or otherwise of a construction put by a Divisional Bench of the High Court. That construction in the present instance accorded with the view we had taken. As regards the frequency of errors in our head-notes, we trust we may, without presumption, venture to express the hope that they would prove of a nature admitting of the same scope for difference of opinion as the present one.

Digitized by Google

distinguish between matters which he may take into consideration under Section 119 and matters in which the decision of the Court of first instance is by law final. The rule is made absolute with costs, Rs. 50.

The 4th December 1874.

Present :

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Ex parte Decree—Evidence—Special Appeal.

Case No. 549 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Mymensingh, dated the 11th August 1873, *reversing a decision of the Moonsiff of Jamalpore, dated the 31st December* 1872.

Goya Pershad Aubustee and others (seme of the Defendants) *Appellants,*

versus

Tarinee Kant Lahoree Chowdhry (Plaintiff) *Respondent.*

Baboos Mohinee Mohun Roy and *Nullit Chunder Sein* for Appellants.

Baboo Huree Mohun Chuckerbutty for Respondent.

Where a suit is tried *ex parte* and no issues of fact are raised beyond the general issue involved in the claim, the decree considered as evidence is only evidence that the amount decreed was at the time due from the defendant to the plaintiff.

Where the evidence before the Lower Appellate Court was not sufficient in law to justify that Court in giving a decree for rent in excess of the amount decreed by the first Court, the High Court in special appeal ordered it to be varied by making it accord with the decree of the first Court.

Phear, J.—We are of opinion that the evidence before the Lower Appellate Court was not sufficient in law to justify that Court in giving a decree to the plaintiff in excess of the amount which was decreed by the first Court. The plaintiff claims, as the holder of one anna six gundahs odd share in a certain zemindaree, to be entitled to be paid by the defendants 16 rupees 4 annas as his, the plaintiff's, share of the rent of a talook held by the defendants within the zemindaree. The only evidence which the plaintiff has adduced to support so much of his claim as exceeds the amount which the defendant admits to be due, is a rent decree passed by the Collector on the 12th July 1862. That decree was passed in a suit wherein the present plaintiff claimed arrears of rent from 1257 to 1268 from the predecessors of the present defendants, and obtained a decree for Rs. 43 odd in respect of those arrears. From the recital of the claim to be found in that decree, the plaintiff appears to have alleged that 16 rupees 13 annas was the share of the jumma of the talook due to him from the defendants ; he admitted that he had received certain unspecified sums in respect of that jumma for the 12 years. And he sought only to recover the balance amounting, as we understand, to Rs. 43 odd. The decree simply gave him this amount. And the plaintiff now contends that that decree constitutes a binding decision between him and the present defendants, to the effect that the share of the rent due to the plaintiff from the defendants in respect of this talook is Rs. 16 odd.

It seems to us, however, that the Moonsiff was right in the view which he took of the effect of this decree considered as evidence between the parties, namely, that it is only evidence that Rs. 43 odd was at the time when the decree was passed due in respect of rent from the defendants to the plaintiff. The allegations made in the claim, so far as we can learn, were not converted into issues ; the suit was tried *ex parte* by reason of the non-appearance of the defendants; and no issues of fact seem to have been raised beyond the general issue involved in the claim, whether or not the Rs. 43 odd was due from the defendants to the plaintiff in respect of the rent claimed.

On the other hand, it appears that the present plaintiffs afterwards brought a suit against the present defendants for four subsequent years ; they alleged in that suit that 16 rupees 13 annas odd was the share of the rent of the talook due from the defendants to them. But this suit was dismissed. So far, therefore, as the result goes, it is at least unfavorable to the plaintiffs as evidence in this matter.

It has been contended on the part of the plaintiffs, and probably rightly, that this decree did not decide any issue between the parties as to the amount of rent payable in respect of the talook by the defendants to the plaintiffs ; that is, the decree of 1872 only determined the amount which was due between the parties at the time when it was passed. But if this be so, it does not better the case of the plaintiffs, although it goes no way to help the defendants. And the plaintiffs' case, therefore, remains as it was

Digitized by Google

just now stated, namely, that there is no evidence to support it excepting the decree of the 12th July 1862. We think that that decree is not sufficient to support the finding of the Lower Appellate Court so far as the excess rent is concerned. And, therefore, the decree of the Lower Appellate Court must be varied by making it accord with the decree of the first Court.

The special appellant must have his costs in this Court and in the Court below.

The 15th December 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Endowments—Jurisdiction—Act XX of 1863—*Waste.*

Case No. 1341 of 1874.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 6th February 1874, *affirming a decision of the Extra Assistant Commissioner of Palamow, dated the 2nd August* 1873.

Syud Imdad Hossein (one of the Defendants) *Appellant,*

versus

Mahomed Ali Khan (Plaintiff) *Respondent.*

Moonshee Mahomed Yusoof for Appellant.

No one for Respondent.

The jurisdiction given to Courts by Act XX of 1863 cannot be excluded by any clause in a deed of endowment.

Where a mutwalee was proved to have been guilty of waste, the High Court ordered him to file in Court every six months, a true and complete account of his income expenditure and dealings with the property belonging to the endowment.

Markby, J.—WITH regard to the objection which has been taken that there is a clause in the deed of endowment which excludes the jurisdiction of the Courts (because that is what the objection really comes to), we think that if that was the intention of the person who inserted that clause it would be invalid. The jurisdiction of the Courts is given by Act XX of 1863, and cannot be excluded by any such clause in the deed. As regards the question of waste, the first Court has found that there was waste, but the Court has abstained from dismissing the present mutwalee, because in its opinion that course would not be conducive to the interest of the endowment; but it has required the mutwalee to produce his accounts before the plaintiff and ten respectable persons. Possibly there might be some practical difficulty in carrying out such an order as this. But it is quite clear that we cannot do what the appellant asks us to do, namely, to dismiss this suit simply, without making any provision for a proper control over his proceedings; and the best conclusion that we can come to is to set aside this order of the first Court, and, instead thereof, to direct that every six months the mutwalee should file a true and complete account of his income expenditure and dealings with the property belonging to the endowment in the Court of the Judicial Commissioner until further orders of this Court; and that, upon doing so, he should on each occasion give notice to the plaintiff that the accounts have been filed, and those accounts should be open to the inspection of the plaintiff.

As to the costs of this appeal we make no order.

[PRIVY COUNCIL JUDGMENT].

The 15th December 1874.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith and Sir Robert P. Collier, *Judges.*

Act VIII of 1859 *s.* 15—*Declaratory Decree—Consequential Relief.*

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Rajah Nilmoney Singh Deo Bahadoor,

versus

Kally Churn Bhuttacharjee.

The right, given by Act VIII of 1859, s. 15, of obtaining a declaration of title without consequential relief, can be claimed only in those cases where the Court could have granted relief if relief had been prayed for.

A suit instituted by a zemindar against a number of his ryots, for a declaration of a mâl title by setting aside, not a deed set up, but an allegation made by the defendants of a bromuttur title, was held to be not maintainable, because relief could not be granted in the shape of merely setting aside an assertion which may have been merely by word of mouth.

THIS was a suit instituted by the Rajah of Pachete against a great number of his ryots, about fifty, "to," in his own language, "obtain possession of ten rekhs, or a ten annas share of Mouzah Raotara, Pergunnah Para,

* From the judgment of Kemp and Ainslie, JJ., in Regular Appeal, No. 79 of 1871, decided on the 29th August 1871.

Digitized by Google

under a mâl title, by setting aside the false mogolee bromuttur title stated by the defendants." The defendants set up different defences; some of them alleged the mogolee bromuttur tenure, which the Rajah complained of their having set up; others repudiated any such tenure, and declared that they had never set it up, and therefore that the suit was brought unjustly against them; others did not appear. The case came in the first instance before the Assistant Commissioner, who in their Lordships' opinion did not sufficiently distinguish between the different classes of defendants. He treated them substantially as all setting up this mogolee bromuttur tenure, and framed his issue with that view. He found in the result in favor of the Rajah, that the Rajah was entitled to possession of the lands in suit, and that the defendants' allegation of mogolee bromuttur holding be set aside.

An appeal was then presented to the High Court, and in their Lordships' judgment the High Court scarcely sufficiently adverted to the distinct defences on the part of the various defendants; the case of some being that they had a bromuttur tenure, that of others being that they had not and never had set it up; as against those last it was necessary for the Rajah to prove that they had set up a bromuttur tenure. The High Court reversed the decision of the Lower Court, and the ground of their decision is expressed in the last paragraph of their judgment:—"On the whole case we think that the onus "being shifted on the plaintiff to prove that "these defendants had, since the year 1197, "paid at a variable rate, and that they have "not paid at the rate of Rs. 121, 9 annas, "as per settlement of 1197, he has altogether "failed to do so. We therefore dismiss the "plaintiff's case, and decree the appeal with "costs." In other words, the High Court appears to have found that the defendants had proved a *primâ facie* case of a mogolee bromuttur tenure, throwing upon the plaintiff the onus of rebutting that case, and that he had failed to sustain the onus thrown upon him. The decree of the High Court is in these terms:—"It is ordered and decreed "by the said Court that this appeal be "decreed, and the decree of the Lower "Court be reversed, and that the suit of the "plaintiff respondent as against all the "defendants be and the same is hereby "dismissed." Their Lordships do not think it necessary to determine whether or not the High Court were right in the conclusion they came to, as to the proof or the rebuttal of proof of the bromuttur tenure, because in their Lordships' opinion the judgment dismissing the suit is maintainable on totally different grounds. This is in substance a suit for a declaration of title, and it is a suit to set aside, not any deed nor any act, but a mere allegation of the defendants that they had a certain tenure. In their Lordships' view such a suit is not maintainable. Section 15 of Act VIII of 1859 is in these words:—"No suit shall be open to objection "on the ground that a merely declaratory "decree or order is sought thereby, and it "shall be lawful for the Civil Court to make "binding declarations of right without granting consequential relief." A similar clause in this country has been held to give a right of obtaining a declaration of title only in those cases where the Court could have granted relief if relief had been prayed for; and that doctrine has been applied to this clause in the Indian Act.

Now, applying that test, in their Lordships' opinion this suit is not maintainable. The Rajah was not entitled to relief in the shape of an order giving him possession, inasmuch as he was in receipt of the rents and profits, and he sought for and could obtain no other description of possession than that which he had. He could not obtain relief by an order directing an enhancement of rent, inasmuch as the cognisance of suits for the enhancement of rent is confined to the Revenue Courts, and a certain procedure is assigned to claims of that kind in those Courts. His requisition of a declaration of a mâl title, by setting aside the false bromuttur title alleged by the defendants, is really no more than this, that he should have his title, whatever it was, as a zemindar, free from the allegation of the defendants that they had some other title. If he had applied to set aside a deed set up by the defendants impugning his ordinary title as a zemindar, then relief might be granted to him by cancelling that deed, but he cannot obtain relief in the shape of merely setting aside an assertion—an assertion, which for all that appears, may have been merely by word of mouth. On these grounds it appears to their Lordships that no relief could have been granted to him if he had prayed for it, and therefore that the suit was not maintainable. They think it right to add that even if no rule of law had barred the suit, still that in their opinion this was not a case in which, in the proper exercise of judicial discretion, a declaration of title should have been made.

Digitized by Google

The real object of the suit would appear to be to obtain a general declaration against a great number of persons, holding by different rights, that they had no bromuttur tenure, of which declaration the Rajah might avail himself in proceedings to be taken in the Revenue Court in suits for the enhancement of rent. It was and will continue to be open to the Rajah to institute any actions he may think fit in the Revenue Court for the purpose of enhancement of rent against all or any of these his tenants; but each of these cases must be tried upon its merits, and ought not to be prejudiced by a declaration such as he has sought to obtain.

Under these circumstances their Lordships, for the reasons given, are of opinion that the decree of the High Court was right, and they will humbly advise Her Majesty that that decree should be affirmed. It is scarcely necessary for their Lordships to add that the decree being affirmed on these grounds, no adjudication has been given in favor of either party upon the question of mogolee bromuttur tenure.

The 22nd December 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Limitation—Suits for Arrears of Rent—Act VIII (B.C.) of 1869 *ss.* 21 *&* 29—*Act X of* 1859—*Zemindar—Talooks—Joint Sharers.*

Regular Appeals from a decision passed by the Subordinate Judge of Mymensingh, dated the 9th July 1873.

Case No. 255 of 1873.

Gobind Coomar Chowdhry (Plaintiff) *Appellant,*

versus

Mr. W. B. Manson and others (Defendants) *Respondents.*

Baboos Hem Chunder Banerjee and *Nullit Chunder Sen* for Appellant.

Baboo Bhowanee Churn Dutt for Respondents.

Case No. 268 of 1873.

Mr. W. B. Manson (One of the Defendants) *Appellant,*

versus

Gobind Coomar Chowdhry (Plaintiff) *Respondent.*

Baboo Bhowanee Churn Dutt for Appellant.

Baboo Nullit Chunder Sen for Respondent.

The words of Act VIII (B.C.) of 1869, s. 29, are intended to apply specially, and exclusively of Act XIV of 1859, to the same class of cases as those which Act X of 1859 applied to, and the class is limited to suits for arrears of rent simply, as "arrears of rent" are defined in Act VIII (B.C.) of 1869, s. 21, *i. e.*, to such suits for arrears of rent as the Collector could have entertained under Act X of 1859.

The zemindar by becoming a shareholder in a talook does not lose his right to the joint responsibility of all the other shareholders for the due payment of the rent: he only becomes bound to make in his claim for rent a just and equitable allowance for that portion of it which he, as a shareholder in the talook, ought to contribute.

Phear, J.—THE plaintiff is part proprietor of a certain zemindaree, and in that capacity is entitled to a 4-anna separate share of the rent of talook Rajissuri Dossee, appertaining to the zemindaree.

It appears that this talook belongs to several shareholders, and is partitioned among them in a somewhat complicated manner; certain kismuts being held each by two or three shareholders jointly in undivided, but ascertained shares, and the rest of the talook by other shareholders jointly in the same manner.

The total jumma of the talook has been fixed, and a defined aliquot part thereof is assessed upon each of the constituent kismuts or mehals of the talook, but as between the zemindar and the shareholders of the taloook, there has been no apportionment among the latter of the liability to pay this jumma, and therefore as regards the zemindar, the shareholders remain jointly liable to pay the entirety of it.

The plaintiff himself, besides being zemindar, is also one of the shareholders of the talook by virtue of the purchase of an 8 gundah share in one of the kismuts.

The defendants are the persons, or the representatives of the persons, who, according to the plaintiff's allegation, were his co-sharers in the talook during the years between Assar 1271 and Choitro 1275, and this suit is brought to recover from them jointly the one-fourth share of the rent of the talook due to the plaintiff for those years, with the deduction of an amount proportionate to the plaintiff's share in the talook.

Several grounds of defence are put forward in the written statements of the different defendants, some of which are seemingly of a vexatious character, but the fate of the suit mainly turns upon two of them only,

Digitized by Google

namely, 1*st*, that the suit is barred by limitation of time, 2*nd*, that the suit is in effect a suit for a partial partition only of the talook, and ought not to be entertained unless a complete partition of the talook among all the share-holders with the assignment of a separate jumma to each is carried out.

The question of limitation is not altogether a simple one. The defendants contend that the enactment, 29th Section, Act VIII of 1869 (B. C.), alone governs the case, and if it does the whole of the plaintiff's claim is unquestionably barred. If, however, the general law of limitation which is to be found in Act XIV of 1859 applies, either in conjunction with Section 29 of Act VIII of 1869 (B. C.), or alone, then the plaintiff may be entitled to sue for a part, or even the whole of his claim.

The words of Section 29, Act VIII of 1869 (B.C.), are identical with those of Section 32, Act X of 1859, and it has been decided both by a Full Bench of this Court (II Weekly Reporter) and by a judgment of the Privy Council, XIX Weekly Reporter, that the latter enactment applied specially to the limited class of suits, which could be maintained in the Collector's Courts under the provisions of Act X of 1859, and in its application to those suits was unaffected by any provisions of the general law of limitation comprised in Act XIV of 1859. But so far as the present suit is concerned, Act X of 1859 has been repealed by Act VIII of 1869 (B.C.), and although the Bengal Legislature has, it may be said, put Section 29 of Act VIII of 1869 (B.C.) in the place of Section 32 of Act X of 1859, it may be open to question whether the relation between Act XIV of 1859 and the enactment of 1869 of the Bengal Council, is precisely the same as that which Act XIV of 1859 bore to Section 32 of Act X of 1859, of the Indian Legislature. The change of jurisdiction as to rent suits, which was effected by Act VIII of 1869 (B.C.) in repealing Act X of 1859, and the omission of the framers of Section 29 of the Bengal Act to preserve by express words the operation of this Section from being influenced by any of the qualifying provisions of Act XIV of 1859, introduce some difficulty in the way of arriving at a correct opinion upon this point. On the whole, however, we think that the principal reasons which weighed with the Privy Council in the judgment referred to (XIX Weekly Reporter) have not been materially weakened in force by the later provincial legislation, and that the words of Section 29, Act VIII of 1869 (B.C.), are intended to apply specially, and exclusively of Act XIV of 1859, to the same class of cases as those which Section 32, Act X of 1859 applied to, although that class cannot now be defined, as it formerly could, by reference to the jurisdiction of the Court in which the cases fall to be entertained. We are of opinion that the class is limited to suits for arrears of rent simply, as "arrears of rent" are defined in Section 21 of Act VIII, 1869 (B.C); *i.e.*, inasmuch as these words are the same as those of Section 20 of Act X of 1859, which defined the jurisdiction of the Collector in this respect, is limited to such suits for the recovery of arrears of rent as the Collector could have entertained under that Act.

Now it is certain that the Collector could not have tried the matter of the present suit, because the plaintiff in the present instance preferred his claim in the Court of the Collector, and it was eventually dismissed in that Court on the ground of want of jurisdiction, and this decision was affirmed by the High Court; for this reason the plaintiff instituted the present suit in the Civil Court. It appears to us, therefore, clear that the question of limitation in the present case is independent of Section 29, Act VIII of 1869, and is governed only by Act XIV of 1859.

But although the present suit is not a suit for the recovery of arrears of rent within the meaning of Section 29 of Act VIII of 1869 (B.C.), it is certainly a suit for rent of land, and so is, we think, within the scope of Clause 8, Section 1 of Act XIV of 1859. The judgment of the Privy Council reported in XIX Weekly Reporter, page 5, if any authority be needed, shows that the word "land" in this Section is not qualified by the immediately preceding words, and extends to all ordinary agricultural land. This Section, therefore, imposes a limitation of three years for the institution of the plaintiff's suit, to be computed from the time when the cause of action arose, and the cause of action in respect of each constituent part of the claim arose when the kist, which it represents, became due.

Section 14 of the same Act, however, provides that:—"In computing any period "of limitation prescribed by this Act, the "time during which the claimant, or any "person under whom he claims, shall have "been engaged in prosecuting a suit upon "the same cause of action against the "same defendant, or some person whom he "represents, *bonâ fide* and with due dili-

Digitized by Google

"gence, in any Court of Judicature which, "from defect of jurisdiction or other cause, "shall have been unable to decide upon it, or "shall have passed a decision which, on "appeal, shall have been annulled for any "such cause, including the time during which "such appeal, if any, has been pending, shall "be excluded from such computation."

And with regard to the plaintiff's claim of arrears of rent for the period between Assar 1271 and Choitro 1273, he instituted a suit in the Collector's Court on the 17th April 1867, which ultimately, on the 1st May 1871, failed for want of jurisdiction. And with regard to his claim for the period between Choitro 1273 and 1275, he instituted a suit in the Collector's Court on the 27th July 1869, which also failed for the same cause on the 1st May 1871. If, therefore, these suits were prosecuted *bonâ fide* and with due diligence, the plaintiff is now entitled to a period of limitation equal to seven years and half a month for his suit so far as concerns his claim to arrears of rent for the years 1271, 1272, 1273, and a period equal to four years nine months for his suit so far as concerns his claim to arrears of rent for the years 1274 and 1275.

The Subordinate Judge, for reasons which we cannot accept, refused to allow the plaintiff the benefit of Section 14 of Act XIV of 1859. It seems to us that the *bona fides* and diligence of that Section have reference solely to the conduct of the suit which failed for want of jurisdiction. And we conclude from the evidence that the plaintiff was entirely in earnest in instituting and prosecuting the suits of 1867 and 1869, and quite believed until the termination of those suits on the 1st May 1871 that the Collector's Court had jurisdiction to entertain and determine them. We also think that he prosecuted these suits with due diligence. Consequently he is in our opinion entitled, as regards the matter of his claim in the present suit, to the periods of limitation which have just been mentioned.

The second principal head of defence is, we think, based upon a slight misapprehension of the nature of the present suit. If the suit had been instituted by the plaintiff solely for the purpose of having determined as between himself and his co-talookdars, the portion of the jumma due to the zemindars which he himself ought to pay, then no doubt each of the other co-sharers in the talook would have a right, without defeating the suit, to ask that his own share of the jumma should be determined at the same time; and so far as the present suit has this object in view, each of the defendants is probably entitled to make this request. But, plainly, the defendants do not now object merely that they have not been afforded a reasonable opportunity of settling as amongst themselves their respective liabilities to contribute to the aggregate jumma payable by all; they simply want to defeat the plaintiff's claim for arrears of rent against them. But this in our judgment they cannot do. The zemindar, by becoming a shareholder in the talook, does not lose his right to the joint responsibility of all the other shareholders for the due payment of the rent: he only becomes bound to make in his claim for rent a just and equitable allowance for that portion of it which he, as a shareholder in the talook, ought to contribute towards the common burden.

On the whole, we think that the decision of the Lower Court is right so far as it goes: but that the plaintiff ought to be allowed a greater period of limitation in respect of the different parts of his claim than the Subordinate Judge has afforded him. The decree of the Lower Court must be varied accordingly, and the plaintiff must have his costs of this appeal.

For the reasons above given, the appeal of the defendant Manson must be dismissed.

The 4th January 1875.

Present:

The Hon'ble W. Ainslie and Romesh Chunder Mitter, *Judges.*

Sale in Execution—Jurisdiction.

Case No. 375 of 1874.

Miscellaneous Appeal from an order passed by the Judge of East Burdwan, dated the 4th August 1874.

Shib Narain Singh and another (Judgment-debtors) *Appellants,*

versus

Gobind Doss Bhukut (Decree-holder) *Respondent.*

Baboo Lukhee Churn Bose for Appellants.

Baboo Umbika Churn Bose for Respondent.

A Court having local jurisdiction is competent to sell in execution of a decree one or more outlying portions

Digitized by Google

of an estate, even though the greater portion of that estate is not within its jurisdiction.

Ainslie, J.—THIS appeal arises out of the proceedings in execution of a decree obtained in the Court of Manbhoom and transferred for execution to the Court of East Burdwan under Section 284 of the Civil Procedure Code. Three objections have been taken to the proceedings of the Burdwan Court: *first*, that that Court ought to have enquired into the right of the person seeking execution to appear as the guardian of the minor Gobind Doss Bhukut and to execute the decree on his behalf; *secondly*, that the transfer of the execution proceedings from the Manbhoom Court to the Court of East Burdwan was irregular; and *thirdly*, that the property which has been attached by the Burdwan Court forms part of an estate paying its revenue into the treasury of the Manbhoom district.

With reference to the first two objections, it appears to us that the appellant has not adopted the proper course. Section 290 of the Civil Procedure Code distinctly lays down the course to be adopted. It is not for the East Burdwan Court to determine whether there were good grounds for the transfer of the decree, or whether the person in whose favor the certificate had been issued, was really the person entitled to execute the decree. On a proper application being made to it, it might have stayed the execution for a reasonable time in order to allow the parties to have those questions decided by the Court of Zillah Manbhoom. It may be noticed here that when the case was called on for hearing by the Judge of Burdwan, no one appeared to support the objection; and it may further be noticed that this property was advertised for sale on the 25th Choitro 1280 or 6th April 1874; and that the judgment-debtor at that time, instead of pressing the objection to the proceedings of the Court, applied for and obtained two months' time to enable him to raise money to satisfy the decree. Whether, under these circumstances, any application under Section 290 ought to have been granted is a matter which admits of considerable doubt.

With regard to the third objection, we are of opinion that the decision in the 19th Weekly Reporter, page 434, relied upon by the appellant, does not go far enough to support his contention. In that case the Civil Court of the District of Nuddea sold an estate, consisting of sixty villages, the greater portion of which, forty-two in number, were within the local jurisdiction of that Court, the revenue for the whole estate being payable to the treasury of Zillah Nuddea. The question which was before this Court was whether, under the sale by the Nuddea Court, any title to the eighteen mouzahs which were within the local jurisdiction of the Court of 24-Pergunnahs would pass. The Court held that, under the circumstances, the Nuddea Court had jurisdiction to sell the whole estate. That was the only question that had to be determined in that case. It is now sought to push that decision further, and to infer from it that if a sale of any of the outlying villages had been held by the Court of 24-Pergunnahs, within whose local jurisdiction they are situated, that sale must have been set aside as irregular. This was not a matter under the consideration of the Court, and it could not have been the intention of the Court at that time to decide the question one way or the other. We see nothing in the Procedure Code which takes away from a Court having local jurisdiction, the power to sell one or more outlying portions of an estate, because the greater portion of that estate is not within the jurisdiction of the Court. It is no where laid down in the Procedure Code that nothing but estates or aliquot parts of estates can be sold; and it is quite clear that the greatest hardship might arise if it were necessary to sell an entire estate consisting of a number of villages when the sale of one or two villages would be quite sufficient to satisfy the decree. There is nothing in the Code to prevent a Court selling a portion of a debtor's property when the sale of that portion is sufficient to meet the claim against him. If proceedings be taken in the East Burdwan Court, and the creditor be satisfied with the attachment and sale of such property as may be within the jurisdiction of that Court, there is nothing that I can see in the law which makes it illegal for the Court to act on his application. We think, therefore, that the appeal ought to be dismissed with costs. Vakeel's fees one gold mohur.

Digitized by Google

The 4th January 1875.

Present:

The Hon'ble W. Ainslie and Romesh Chunder Mitter, *Judges.*

Usufructuary Mortgage — Decree — Execution — Act XXIII of 1861 *s.* 11.

Case No. 325 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Beerbhoom, dated the 29th June 1874, ***affirming an order of the Officiating Subordinate Judge of that district, dated the 21st February*** 1874.

Golam Russool Khan (Judgment-debtor) *Appellant,*

versus

Kishen Mohun Shaha (Decree-holder) *Respondent.*

Baboo Ashootosh Mookerjee for Appellant.

Baboo Luckhee Churn Bose for Respondent.

In a suit for possession under an usufructuary mortgage, plaintiff obtained a decree which was afterwards authoritatively interpreted to mean that he was to get possession of the property in order to repay himself out of the profits, keeping the usual accounts, and after satisfaction of his claim, restore the property:

HELD that, under the terms of the decree, he was in effect required to certify for the information both of the Court and of the judgment-debtor, the amounts received and outstanding, and that the Court executing the decree was bound to require from him, from time to time, a statement of the amount received, and to deal with the matter under Act XXIII of 1861 s. 11.

Ainslie, J.—IT appears that the appellant borrowed a sum of money from the respondent upon an agreement to put the latter in possession of certain property in order that he might repay himself out of the rents and profits thereof. It also appears that the special appellant did not give him possession of the property, and he brought a suit to obtain possession. On the 19th July 1870 he obtained a decree, which was not simply, as it might have been, a decree for possession, but was a decree that he should recover the amount due to him from the profits of the mehal referred to in the agreement. Doubt having arisen as to the effect of this decree, the matter came before the Court and it was determined by an order of the 27th July 1871, which was confirmed on regular and special appeals. That order seems to have somewhat extended the original decree, but whether it did so or not we must take it that the interpretation put upon the decree in 1871 is final and binding upon the parties; and that interpretation is to this effect, that the creditor is to obtain possession of the property in order to repay himself out of the profits the amount advanced by him; that he is to keep the usual accounts; and that after he has satisfied his claim, he is to restore the property to the borrower. Accordingly, the creditor was put in possession by the Court. If the decree had been simply one for possession by the plaintiff under his usufructuary mortgage, it would have been for the debtor to establish in a regular suit that the debt had been fully repaid out of the usufruct. But when the Court specifically provided by the terms of the decree for the doing of certain things by the plaintiff, and the plaintiff accepted the decree in that form, the defendant acquired a right to have the decree executed in accordance with these special provisions, and it, therefore, seems that the matter is one which must be dealt with under Section 11 Act XXIII of 1861. The Court directed that the creditor should be put in possession; that he should keep accounts; and that he should restore the property to the borrower as soon as his claim should be satisfied. By Section 206 of the Procedure Code, it is enacted that "all moneys payable under a "decree shall be paid into the Court whose "duty it is to execute the decree, unless "such Court or the Court which passed the "decree shall otherwise direct. No adjust-"ment of a decree in part or in whole shall "be recognized by the Court, unless such "adjustment be made through the Court or "be certified to the Court by the person in "whose favor the decree has been made, or "to whom it has been transferred." In this case, by the order of the 27th July 1871, the Court which was executing the decree directed that the money recoverable by the decree-holder should be taken by him directly out of the profits of the estate without passing through the Court at all. Under these circumstances, I think that the Court was bound to require from him, from time to time, a statement of the amount recovered by him, and that under the terms of the decree requiring him to keep accounts he was in effect required to certify for the information, both of the Court and of the judgment-debtor, the amounts received and the amount from time to time outstanding.

Digitized by Google

Had he done this, which was the consequence of the form of the order of the 27th July 1871, these proceedings would have been unnecessary, unless the judgment-debtor wished to question the accuracy of the accounts rendered by the decree-holder. So far, then, as the Judge below is of opinion that he could not make any declaration in the present instance as to the amount outstanding due by the debtor to the creditor, I am of opinion that he was in error; but when we come to the other part of the case, it seems that the special appeal must fail, for we find on comparison of the judgments of both the Lower Courts, read with the other parts of the record, that there has been a statement of the account rendered by the judgment-creditor and accepted by both the Courts. The words of the first Court are as follows:—"There is no proof "that it yields the sum the judgment-debtor "mentions; the decree-holder denies it does, "and so do the gomastahs who realized the "rents; therefore the petitioner can only get "a set-off for what has been actually realized "by the judgment-creditor, which has been "done." Then the question went before the Lower Appellate Court, and the contention there was substantially, not that the account of the actual receipts rendered by the judgment-creditor was incorrect, but that the judgment-creditor was bound, by due care and diligence, to realize a larger sum, and the debtor ought to have had credit for that larger amount. The Judge disposes of this question by saying that "there is a total "absence of all proofs that due care and "diligence were not exercised, and the "probabilities are against the supposition "that any amount of due care and diligence "would have enabled the party in possession "to have realized the whole of the profits. "On the other hand, the judgment-creditor "has distinctly declared, and examined wit-"nesses to prove, that he has not realized "all that is due to him, and the evidence "has not been rebutted." I think that it must be taken that the Judge is alluding to the evidence adverted to by the first Court, namely, that of the gomastahs who realized the rent, and that he when he says "this "evidence has not been rebutted," he means to accept it as truthful. It is contended that the Judge was merely considering whether there was evidence of the existence of some balance without reference to its amount. But I do not so read his judgment. What the Judge, as I understand him, means to say is that he substantially agrees with the first Court in believing the evidence of the gomastahs that the actual amount of collection was that which was stated by the judgment-creditor in his account.

Under these circumstances, I think that the special appeal ought to be dismissed, each party paying his own costs in this Court.

Mitter, J.—I am also of the same opinion. I think that the Judge was not right in holding that in this execution proceeding he could not make any adjustment of accounts between the parties. Under Section 11 Act XXIII of 1861 he was competent to adjudicate upon questions relating to the sums alleged to have been paid in discharge or satisfaction of the decree. What the judgment-debtor alleged was simply this, that the decree has been wholly satisfied by the payment made to the decree-holder by his realizing the profits of the estate which was made over to his possession in execution of this decree; and as the question, what is the amount which has been paid towards the satisfaction of the decree, is a question which is directed by Section 11 Act XXIII of 1861 to be determined by the Court executing the decree, I am of opinion that the Judge was not right in holding that he could not enter into it. But I think that he was right in restricting the adjudication of that question only to this point, namely, what is the actual amount of collection made by the judgment-creditor? It appears to me that the judgment-debtor wanted to raise a further more intricate question before the Judge, namely, whether or not the judgment-creditor could have realized, by due care and diligence, more than he has done. This I do not think the Court in executing the decree can entertain. If the judgment-debtor was so advised, he could have raised that question in a properly framed suit for the purpose of redeeming the property. But as he has chosen to raise that question in execution proceedings, and as under Section 11 the Court executing the decree can only determine what sums had been actually paid towards the satisfaction of the decree, I think that the Judge was right in refusing to enter into it.

With reference to the statement of the accounts on the footing of the actual collection, it appears to me that both the Courts below have come to a finding, and in special appeal that finding is not open to revision. The judgment-debtor, if he chooses, can apply to the Court, after paying the amount found due, to recover possession of the property; but this special appeal must fail.

Digitized by Google

The 5th January 1875.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Issues—Pleadings—Remand.

Case No. 50 of 1874.

Regular Appeal from a decision passed by the Subordinate Judye of Sarun, dated the 13th December 1873.

Jowadunissa Satudai Khandan and others (some of the Defendants) *Appellants,*

versus

Jhaman Lall Misser and another (Plaintiffs) and others (Defendants) *Respondents.*

Mr. G. H. P. Evans and *Baboo Judoonath Sahoy* for Appellants.

Messrs. J. T. Woodroffe and *C. Gregory* for Respondents.

Where no objection was taken in the grounds of (regular) appeal to the issues as framed in the Court of first instance, nor was there any such contention in those grounds as that the High Court ought to direct the subordinate Court to raise the proper issues, the Court refused to remand the case with a view to other issues being raised and tried, as it thought it would not be justified to travel out of the record and make a case for the defendants which they did not make in their pleadings in the Court below and which was not in issue in that Court.

Kemp, J.—THE appellants in this case were not originally parties to this suit but were made so on their application dated the 2nd of December 1873. That application will be found in the printed book of appeal No. 51 at page 19. By some mistake, to say the least of it, that petition, instead of being with the file of No. 50 which is now under consideration, is on the file of No. 51. The several points taken by Mr. Evans, the learned Counsel who appears for the appellants in this case, are, in the opinion of the Court, points which were not taken in the Court below and were not raised either in the pleadings or in the issues.

The suit was brought by the plaintiffs for the price of indigo seed. They claim to recover Rs. 13,500 being the price of indigo seed supplied to the Arwah and other concerns in the district of Sarun. The plaintiffs are residents of Zillah Cawnpore and the seed was supplied to the factory of Arwah from that district. The quantity of seed supplied was 1,500 maunds at the rate of 9 rupees per maund. The suit was brought against Mr. Macrae, the manager of the Arwah concerns, and against Abdool Hye and Mehdee Khanum, the former being the son of the late Kazee Rumzan Ali, and the latter, the widow of that gentleman who in his lifetime was the proprietor of the Arwah factory which consists of six concerns. It appears that owing to the indebtedness of the late Kazee Rumzan Ali, these factories were attached by the Court and a manager appointed under the provisions of Section 243 of the Code of Civil Procedure, and at the time the suit was brought Mr. Macrae was the manager; and in his evidence he informs us—and this statement has not been contradicted—that he has been the manager for three years.

In answer to the suit of the plaintiff, the original defendants, Mr. Macrae and Abdool Hye, who have been examined in this case and whose examination is to be found at page 6 of the printed book, admitted the plaintiffs' claim to be a just one. Abdool Hye in his evidence states that he was well aware that Mr. Macrae actually purchased the indigo seed for which the plaintiffs have brought the present action; and Mr. Macrae in his evidence also admits that the indigo seed was purchased by him; that it was sown in March 1873, and that the agreement with the plaintiffs was that when the indigo was sold the price of the seed was to be paid from the sale-proceeds, and that he has no objection to the plaintiffs' claim.

The defendants, appellants before us, the intervenors in the case, in their petition applying to be made parties to this suit, stated the reason why they should be made parties to the suit as follows, namely, that the suit of the plaintiffs was a collusive one instituted with the view to injure the intervenors. They then refer to a bond dated in February 1873 and to an estimate drawn up, as they allege, by Mr. Macrae, and they allege further that the indigo was pledged to them; that on their petition the indigo was attached, and therefore, until the whole of the amount covered by their bond is paid, no other person has any right to obtain either the indigo or any portion of the proceeds of the sale of the indigo; that the present suit has been brought after the institution of their own suit; and that the defendants, Mr. Macrae and Abdool Hye, and the plaintiffs in the present case No. 50, have colluded together in order to injure them. No such points, as have been raised by the learned Counsel in his argument, namely, that the deed upon which the plain-

Digitized by Google

tiffs come into Court as the basis of their claim does not hypothecate the indigo or the proceeds of that indigo, or any question as to priority of security, or as to the authority of Mr. Macrae as manager, are raised in the petition praying the Court to be admitted to intervene and defend the suit. Then again in the written statement filed by the defendants, appellants in this suit, we find that they state that the claim of the plaintiffs to recoup themselves out of the proceeds of the indigo by virtue of the collusive sattah and receipt was a pure falsehood. Then again in para. 4 of that written statement, they say that the sattah and receipt pleaded by the plaintiffs are obviously collusive and not entitled to be given any weight to by the Court. In the fifth ground of the written statement, mention is made that the manager without the order of the Judge is not competent to execute the sattah relied upon by the plaintiffs, and further that ground goes on to say that such sattah from any point of view is void and illegal.

The issues laid down in the case are to be found at page 35 of the printed book, *viz.*, 1*st*, Whether the suit is maintainable or not on account of the deed which is the basis of the claim not being filed with the plaint? 2*nd*, Whether the suit can be maintained on account of the deed aforesaid being written on an unstamped paper? 3*rd*, Whether the ekrarnamah, that is, the sattah, the basis of the plaintiffs' claim, is a collusive deed or not? 4*th*, If that deed is not a collusive one, then whether the intervenors, defendants, Mitto Bibee and Mundeer Bibee, have a preferential right to realize their debts from the price of the indigo for the reason of the ekrarnamah in their favor being a registered one and the deed which is the basis of the plaintiffs' claim being an unregistered document? Now the points which have been dwelt upon by the learned Counsel, Mr. Evans, in this appeal were, firstly, that the sattah on which the plaintiffs' claim is based does not hypothecate the indigo or the proceeds of the indigo; and, secondly, as to the authority of Mr. Macrae as manager to execute that sattah.

Now, as already observed, these points were not raised in the issues before the Court below. The question whether the sattah hypothecated the indigo or the proceeds of the indigo was not taken in the written statement, and although the question of the authority of Mr. Macrae as manager was raised in one of the grounds of the written statement, no issue was raised on that point. In this case Abdool Hye and Mr. Macrae were examined on the 10th of December 1873, and the issues were settled on the same day after the written statements of the parties had been put in. We also find that from the written statement of the defendants, appellants before us, they must have been fully aware of the nature of the plaintiff's claim as also of the document upon which that claim was based, for without that knowledge they would not have been able to raise the plea which they have raised that that document was on unstamped paper.

Mr. Evans has contended that although these issues were not raised in the Court below and are not to be found in the written statement, this Court ought to remand the case and direct the Subordinate Judge to raise and try the proper issues in the case. Now in the grounds of appeal to this Court no objection whatever is taken to the issues as framed in the Court below, nor is there any such contention in those grounds that the wrong issues have been raised or that this Court ought to direct the Subordinate Court to raise the proper issues. It appears that in the course of the trial in the Court below the plaintiffs did attempt to raise other issues than those originally framed, which attempt was unsuccessful, and there was nothing to prevent the intervenors, defendants, from asking the same indulgence from the Court and having any necessary issue in the case framed by the Court. We, therefore, think we should not be justified to travel out of the record and make a case for the defendants which they did not make in their pleadings in the Court below and which was not in issue before that Court.

In the case of Eshan Chunder Singh decided by the Privy Council on the 3rd of November 1866,* in the judgment delivered by Lord Westbury, this Court was instructed "that it was absolutely necessary that the "determination in a case should be founded "upon the facts pleaded by the parties in "their pleadings and upon the case thereby "made." His Lordship also in the same case "observes that it would introduce the great-"est amount of uncertainty into judicial "proceedings if the final determination of "causes were to be founded upon inferences "at variance with the case that the plaintiff

* 6 W. R., P. C., 57.

Digitized by Google

"has pleaded, and, by joining issues in the "case, has undertaken to prove."

Now the case of the plaintiff in this suit was a very simple one. He said I have supplied so many maunds of indigo seed to this factory and I ask for the price of that seed as agreed upon, out of the proceeds of the indigo produced from that seed and which proceeds are under an attachment issued by the Court. The principal defendants, namely, the manager and the present proprietor of the factory, admit the justness of the plaintiffs' claim. The intervenors come in alleging that they have a prior lien on the proceeds of that indigo, but they do not in any way, as already stated, raise the questions now raised by their Counsel in this Court for the first time, namely, that the sattah or deed upon which the plaintiffs base their suit does not hypothecate the indigo or the proceeds of that indigo, or that the manager Mr. Macrae acted beyond the scope of his authority in executing that sattah. For these reasons we dismiss the appeal with costs.

The 7th January 1875.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Decree—Execution—Limitation.

Case No. 411 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Bhaugulpore, dated the 18th July 1874, *affirming an order of the Moonsiff of Monghyr, dated the 17th March* 1874.

Ram Sahoy Singh (Decree-holder) *Appellant,*

versus

Chet Narain Singh (Judgment-debtor) *Respondent.*

Baboo Kalee Kishen Sen for Appellant.

Moonshee Abdool Baree for Respondent.

Instead of suing out execution against P's estate, as directed in his decree, a decree-holder brought a suit to have it decided who were P's legal representatives. Having obtained a decree in this suit, he applied for execution of the original one; but after three years from the date of the latter,

HELD that the application was barred by limitation.

Kemp, J.—WE think the decision of the Courts below in this case is a correct decision. The decree-holder obtained a decree, dated the 21st of April 1870, under which he was entitled to recover the amount decreed from the estate of one Mussamut Phoodoo. In the judgment in that case some remarks were made as to who was the heir or legal representative of Mussamut Phoodoo, the mortgagor, against whose estate the decree was passed, but the decretal order is very distinct in directing execution as against the estate of Mussamut Phoodoo. Instead of executing this decree against the estate of Mussamut Phoodoo, the decree-holder thought proper to bring another suit against other parties to have it decided who were the legal representatives of the aforesaid lady, and a decree was passed in June 1871. The present application is made within three years of that decree, but in the application which was filed under Section 212, the decree which was sought to be executed is mentioned to be the decree of the 21st of April 1870. It is, therefore, clear that when the application was made in January 1874 more than three years had elapsed from the date of the original decree, and we concur with the Judge below in holding that the petitioner ought to have sued out execution of the decree originally obtained by him, and not to have waited the result of the second suit. The appeal is dismissed with costs. Pleader's fees two gold mohurs.

The 7th January 1875.

Present:

The Hon'ble W. Ainslie and Romesh Chunder Mitter, *Judges.*

Special Appeal—Remand.

Case No. 1232 of 1874.

Special Appeal from a decision passed by the 1st Subordinate Judge of Chittagong, dated the 27th March 1874, *reversing a decision of the Moonsiff of Cox's Bazar, dated the 18th December* 1873.

Shundhabun Mohunt (Defendant) *Appellant,*

versus

Shurut Chunder Roy (Plaintiff) *Respondent.*

Baboo Chunder Madhub Ghose for Appellant.

Baboos Sreenath Banerjee and *Aukhil Chunder Sen* for Respondent.

The Lower Appellate Courts' judgment was set aside in special appeal, and the case remanded for re-trial,

Digitized by Google

because that judgment had not been based upon the whole evidence upon the record.

Mitter, J.—THE plaintiff in this case, who is a zemindar, sued to measure the lands of five tenures in the possession of the defendant under the provisions of Section 37 of Act VIII (B.C.) of 1869, The defendant in his defence pleaded that the zemindar was restrained by the condition of the engagements executed by him from measuring the lands of these tenures. The first Court, having found that the title-deeds of the defendant regarding these tenures had been plundered by the plaintiff,—that the plaintiff was called upon to produce those deeds, and that he did not produce them—held that, under the peculiar circumstances mentioned above, the secondary evidence given by the defendant, that is, his statement on oath, was sufficient to make out the case for the defence so far as three of these tenures were concerned. Upon these grounds the Moonsiff gave a modified decree in favor of the plaintiff, dismissing the claim relating to those three talooks. On appeal the Subordinate Judge has reversed this decree, decreeing the plaintiff's suit wholly. We think that the judgment passed by the Subordinate Judge is erroneous, inasmuch as it is based not upon the consideration of the whole evidence in the case. The Subordinate Judge in his judgment makes the following observation :—

"The defendant admits that the talooks "specified in the plaint are held by him under "the plaintiff, but contends that, under a "special covenant embodied in the lease, the "said talooks are not liable to survey and "measurement. Hence, according to the pro- "visions of Sections 102 and 103 of Act I "of 1872, the onus of proving the above "point lies upon the defendant. But he has "not adduced any oral and documentary "evidence in proof of the matter. The "Lower Court has decided the case simply "by relying upon the evidence on oath "tendered by the defendant, but I do not "approve of this decision." Evidently the Subordinate Judge was of opinion that the only evidence upon which the Moonsiff relied was the bare statement on oath of the defendant. Also in another passage the Subordinate Judge observes that the defendant's case rests only upon his own testimony. Under these circumstances, we think that he has entirely overlooked certain circumstances mentioned in the Moonsiff's judgment, and which fully corroborate the evidence of the defendant. It was found by the Moonsiff that the title-deeds by which this covenant could be proved by the defendant were plundered by the plaintiff himself, and that they were in his custody. It was also found that although he was called upon to produce those documents, he neglected to do so, and thereby prevented the defendant from proving his case by the best evidence,—*viz.*, the documents which were interchanged between the parties. It was further found by the Moonsiff that the real counterparts of those documents which could have also proved the defendant's case, were not produced by the plaintiff; he produced certain documents alleging them to be the real counterparts of those deeds, which were not at all proved, but on the other hand, found by the Moonsiff to be forgeries. These circumstances appear to us to have been entirely overlooked by the Subordinate Judge, and he has decided the case under the impression that the defendant's defence solely rests upon his bare statement on oath. Therefore his judgment has been based not upon the whole evidence upon the record.

For these reasons, we think that the judgment of the Subordinate Judge cannot stand, and must be set aside, and the case remanded to him for re-trial upon the whole evidence on the record. Costs to follow the result.

Ainslie, J.—I concur.

The 8th January 1875.

Present :

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Decree—Objections after Execution.

Case No. 200 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 17th July 1874, *reversing an order of the Moonsiff of Sewan, dated the 12th September* 1873.

Kishen Pershad Roy and others (Decree-holders) *Appellants,*

versus

Shaikh Enait Hossein (Judgment-debtor) *Respondent.*

Mr. C. Gregory for Appellants.

Moonshee Mahomed Yusoof for Respondent.

A decree having been executed and possession obtained under it, one of the judgment-debtors presented a petition objecting that when execution had been taken out the decree was barred by limitation. The Court of

Digitized by Google

first instance rejected the petition and an appeal was presented to the Judge:

HELD that the appeal ought not to have been entertained, the suit having been disposed of, and possession given to the judgment-creditor.

Kemp, J.—THE decree-holders are the special appellants in this case. It appears from the decision of the Moonsiff that they obtained possession in execution of a decree obtained by them on the 16th December 1872. On the 30th of May 1873, Shaikh Enait Hossein, one of the judgment-debtors, presented a petition to the Moonsiff setting forth that the decree-holder had obtained possession fraudulently, and that the decree at the time the judgment-creditor took out execution and obtained possession was barred. The Moonsiff, after calling upon his amlah to submit a kyfeut, and after sending for the case which had been sent to the Judge's office, inasmuch as the suit had been finally disposed of, passed an order rejecting the petition of Enait Hossein. The Moonsiff says that there is no suit pending in his Court in which this petition of ozurdaree can be heard, that possession had been delivered to the decree-holder, and further that the petitioner had not produced the decision of the High Court which he was directed to produce. The petitioner before the Moonsiff then appealed to the Judge, and the Judge says that the appeal appears to him to be a good one. Then he says that whether the petitioner heard of the decree, as he says, for the first time when he filed the petition or not, the execution of the decree is barred, inasmuch as the decree is dated the 29th of February 1868, and no proceedings were taken out by the judgment-creditor until the 23rd of August 1872. He therefore decrees the appeal with costs.

In special appeal the first ground taken is that the Lower Court was wrong in entertaining the appeal and the objection of the judgment-debtor, which was thrown out by the first Court on good and valid grounds. There are other grounds on the question of limitation, but we do not think it necessary to go into that question. We are clearly of opinion that the Judge ought not to have entertained this appeal. The suit had been disposed of, and possession had been given to the judgment-creditor on the 16th of December 1872.

We do not think it necessary to state what remedy the respondent may have. It is sufficient to say that the appeal ought not to have been entertained by the Judge. His decision is reversed with costs. Pleader's fees two gold mohurs.

The 8th January 1875.

Present :

The Hon'ble W. Ainslie and Romesh Chunder Mitter, *Judges.*

Evidence Act (I of 1872) s. 13—Judgment on Compromise.

Case No. 1424 of 1874.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 1st April 1874, reversing a decision of the Extra Assistant Commissioner of Hazareebaugh, dated the 5th December 1873.

Roop Chand Bhukut (one of the Defendants) *Appellant,*

versus

Hur Kishen Doss (Plaintiff) *Respondent.*

Baboo Tarucknath Dutt for Appellant.

Mr. R. T. Allan for Respondent.

Where a suit was disposed of according to a compromise, of which the judgment set out the terms in the form of a recital, HELD that the judgment, though not in the ordinary form of a decree, was the record of a transaction by which the rights of the parties were recognized, and was therefore relevant as evidence under the provisions of Act I of 1872 s. 13.

Ainslie, J.—IN substance the ground of special appeal in this case is that the Lower Appellate Court is in error in admitting in evidence three documents, *viz.*, a judgment of the Chowsa Moonsiff's Court, dated 3rd February 1832, and two agreements made, one in 1838 and the other in 1852, between the ancestors of the two defendants. It is only necessary for the purposes of this appeal to consider the first, because if that is admissible, it is quite clear that, upon the facts established by it taken with the fact found by the Judicial Commissioner that there is no evidence whatever of subsequent separation of the family, we would be justified in presuming that the status of the family has been unchanged since 1832; and under the last Section of the Evidence Act, the improper admission of evidence is no ground for reversing a decision, if it appears that, independently of the evidence objected to as improperly admitted, there was sufficient evidence to justify the decision. The judgment of the 3rd February 1832 is objected to under Section 42 of the Evidence Act, but under the last words of that Section this judgment may be relevant if it can be brought in under some other provisions of

Digitized by Google

the Act. This judgment, undoubtedly, is the record of a transaction by which the rights of the parties were recognized in 1832, and therefore, under the provisions of the 13th Section, that transaction is relevant. No doubt, the judgment is not in the ordinary form of a decree, but that seems to have arisen from the circumstances of the case. The parties came to a compromise, and the suit was disposed of in accordance therewith, and the judgment sets out the terms of the compromise. Under these circumstances it seems to us that those terms must be taken as having been adopted as the order of the Court, although they are only set out in the judgment in the form of a recital. We, therefore, think that this special appeal ought to be dismissed with costs.

The 8th January 1875.

Present:

The Hon'ble W. Ainslie and Romesh Chunder Mitter, *Judges.*

Vendors and Purchasers—Possession—Right of Suit.

Case No. 1653 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Maunbhoom, dated the 10*th June* 1874, *reversing a decision of the Extra Assistant Commissioner of Rughoonathpore, dated the* 31*st December* 1872.

Nittyanund Gossain and another (two of the Defendants) *Appellants,*

versus

Shama Churn Chatterjee (Plaintiff) *Respondent.*

Baboo Bama Churn Banerjee for Appellants.

Baboo Jogendro Dutt for Respondent.

Purchasers of property have a good right of suit where their vendors had been in peaceable possession, but were disturbed and dispossessed within the period of limitation.

Ainslie, J.—THE first ground of special appeal is that the Lower Appellate Court is wrong in point of law in holding that the plaintiff's vendors could confer upon him a title by sale of property of which they themselves were not in possession. This ground of appeal was supported by certain decisions, both of the Privy Council and of this Court. There is a case in the 22nd Weekly Reporter, page 99, in which the judgment was delivered by Mr. Justice Phear, who also noticed the earlier cases relied upon by the appellant. That case, I think, disposes of the present one. Mr. Justice Phear in that case says:—"We have been referred on this "point to the case reported in the XXI "Weekly Reporter, page 101, and to the "cases decided in the Privy Council and in "this Court, which are cited in that report. "But in all these cases we find that the "property which was the subject of convey-"ance had never before the date of the "conveyance been in the possession and "enjoyment of the person who professed to "convey it. And the Courts held that, under "the circumstances of those suits, the con-"veyance did not of itself operate to pass a "right to sue alone for the immediate posses-"sion of the property, and that it was at "least essential to such a right that the "vendee should be in a position to claim "specific performance of the contract of "conveyance from his vendor. The facts of "the present case are different, because both "the Courts below have found that Parbutty "Kooer had been in possession and enjoyment "of the property, which is the subject of "suit, for some four years before she was "wrongfully ousted from the property by the "defendants in the way she alleges in her "plaint, and she herself in her plaint states "that she has effectively given a share of the "property to her co-plaintiffs." The learned Judge draws a distinction between cases in which a party entering into possession of the property has been disturbed in that possession, and cases in which the right has not been followed by possession.

In the present instance, it appears from the judgments of both the Courts that the vendors of the plaintiff were at one time in peaceable possession of the disputed property, and that they were disturbed and possession taken from them some eight or nine years since, apparently on the death of one Bissen Gossain, the brother of the plaintiff's vendors. The facts of the present case seem to be similar to those of the case I have just quoted; and I think that we ought to follow the judgment in that case, and to hold that in this case (without reference to the general question), there is a good right of suit in the plaintiff.

As to the other ground of appeal, it seems to me that both the Courts below have substantially found that this property is not in any way debuttur property of the defendants, because they have found that it is a property

Digitized by Google

which formed the share of the vendors of the plaintiff. I am therefore disposed to think that this special appeal ought to be dismissed with costs.

Mitter, J.—I concur in this judgment. I wish only to add that in special appeal No. 962 of 1874, decided in December last by Mr. Justice Markby and myself,* we expressed our views upon the question of law raised in the first ground of special appeal, and that view is against the contention raised by the special appellant: therefore that ground fails. I also concur in the judgment of my learned colleague upon the other grounds of special appeal.

The 8th January 1875.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Remand—Ameen's Fees—Wassilat.

Case No. 328 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Bhaugulpore, dated the 4th July 1874, *reversing an order of the Subordinate Judge of that district, dated the 27th June* 1874.

Gowhur Ali Khan (Decree-holder) *Appellant,*

versus

Joy Mungul Singh (Judgment-debtor) *Respondent.*

Mr. C. Gregory and *Baboo Rajendronath Bose* for Appellant.

Baboo Nil Madhub Sen for Respondent.

In a suit for possession with wassilat, the first Court setting aside the report of the Ameen, decreed the claim and awarded the amount of mesne profits upon the evidence of witnesses. The Lower Appellate Court remanded the case, and directed the deputation of another Ameen. The decree-holder not having put in the Ameen's fees, the case was returned to the Lower Appellate Court which dismissed the suit.

HELD, that it was not necessary to depute another Ameen, and that the Lower Appellate Court ought to have tried the question as to wassilat due, upon the materials on the record.

Kemp, J.—THE decree-holder is the appellant in this case. He obtained a decree for possession with wassilat as against the judgment-debtor, the respondent before us. The Subordinate Judge, on the 31st January 1874, set aside the report of the Ameen as one not to be depended upon inasmuch as the Ameen had made that report upon his own personal knowledge. Then the Subordinate Judge goes on to say that the judgment-creditor has brought certain cultivators, tenants, and the patwaree of the mouzah, who have been examined, and that the Ameen has not assigned any sufficient reason for not believing these witnesses. Then the Subordinate Judge says that the witnesses for the judgment-debtor, the respondent before us, are not inhabitants of the mouzah in dispute, and that their testimony has not been relied upon by the Ameen. The Subordinate Judge, therefore, was of opinion that the evidence of the witnesses for the judgment-creditor must predominate over the evidence of the witnesses for the judgment-debtor. The Subordinate Judge then says that he assumes that the minimum rate deposed to by the witnesses for the judgment-creditor, whose evidence he considers to be better than that of the witnesses for the judgment-debtor, must be taken as the basis upon which the wassilat must be calculated. He, therefore, awarded to the judgment-creditor wassilat on that principle, with interest at 6 per cent. from the 31st January 1874. The Judge on appeal says that it appears impossible for him to decide the amount of mesne profits due, that the Subordinate Judge appears to have taken the evidence of the witnesses who made the lowest appraisement to be the most truthful; and he thinks it necessary to remand the case under Section 354, and he directs that another Ameen be deputed. The case went back to the same Subordinate Judge. The decree-holder did not put in the Ameen's fees, and the Subordinate Judge returned the case adhering to his former opinion. After the remand, the Judge has held that he is not in a position to decide how far the original decision of the Subordinate Judge ought to be modified; and as the decree-holder has not put in the Ameen's fees, his claim for wassilat must be dismissed in toto.

In special appeal it is contended that the Judge is wrong in law in reversing the order of the first Court and in allowing no amount as mesne profits on the failure of the decree-holder to put in the Ameen's fees, and that the Court should have assessed mesne profits upon such materials as were available.

We think it was not necessary in this case to depute another Ameen. There was evidence as to the amount of wassilat due, and the Subordinate Judge for reasons given in his decision of the 31st of January 1874 preferred the evidence adduced by the judgment-creditor to that adduced by the

* *Ante*, p. 131.

Digitized by Google

debtor, and we think the Judge is clearly wrong in dismissing altogether the decree-holder's claim for wassilat. We, therefore, remand the case to him to try the question as to the amount of wassilat due, upon the materials on the record.

The case will be remanded. Costs to follow the result.

The 11th January 1875.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble E. G. Birch, *Judge*.

Sale by Vendors not in Possession—Conveyance without Consideration—Right of Suit—Public Policy.

Case No. 746 of 1874.

Special Appeal from a decision passed by the Officiating Second Subordinate Judge of Mymensingh, dated the 20th January 1874, reversing a decision of the Moonsiff of Nicklee, dated the 31st December 1872.

Bishonath Dey Roy (Plaintiff) *Appellant*,

versus

Chunder Mohun Dutt Biswas and others (Defendants), *Respondents*.

Baboo Nullit Chunder Sen for Appellant.

Baboo Rajendro Nath Bose for Respondents.

Alleged purchasers, whose vendors were not in possession and who pay nothing for what is said to have been sold to them, are not competent to maintain a suit for possession of the property in dispute.

In the case of a person who, having been defeated in a former suit, seeks out from vindictive feelings others who he thinks can establish a claim to the property in dispute, and prevails upon them to assign to him their supposed rights, it would be contrary to public policy to allow such a suit to be maintained.

Couch, C.J.—In this case the Subordinate Judge in his judgment says:—"I am "clearly of opinion that the plaintiff and "his brother at first advanced objection as "heirs, and, having failed, they afterwards "vindictively found out the defendants Nos. "5 and 6, caused two kobalas to be executed "without payment of consideration, and in-"stituted this suit with a vain hope of ob-"taining the property which their vendors "were not in possession of. If it be argued "that when consideration is mentioned in "the kobala, how can it be said that the "purchase was made without consideration,— "in fact if the purchase of a share, bear-"ing the sudder jumma of Rs. 27-9-7-1-5, "together with mesne profits, for a con-"sideration of Rs. 60 only, be not consi-"dered as a purchase without considera-"tion, what else can it be? It is clearly "mentioned in the kobala that the defend-"ants Nos. 5 and 6 being poor, failed to "seek redress through law, and therefore "sold (the property) to the plaintiff. From "this it appears very clearly that the defend-"ants Nos. 5 and 6 did not cherish any "expectation of the said property. From "the purport of the kobala, I am fairly of "opinion that mention was merely made of "the consideration in the kobala, in reality "the plaintiff did not pay the consideration. "Be that as it may, when the plaintiff of his "own accord purchased a property which "was not in possession (of the vendor) and "has brought this suit, the plaintiff's suit is "become defective on the ground of its being "a champerty suit. For this defect the "plaintiff's suit is liable to be dismissed." He finds, then, not merely that the defendants Nos. 5 and 6, whose rights the plaintiff said he had purchased, were not in possession, and that all that they had was a right of suit for obtaining the property, but also that the plaintiff in fact never paid anything for what is said to have been sold to him, and only got these two defendants to execute the kobala in order to enable him to bring a suit against the other four. The decision quoted by the Subordinate Judge is in point.* Under such circumstances, the plaintiff cannot maintain a suit. That decision only followed a decision of the Judicial Committee of the Privy Council. Upon such a finding as this, it is clear upon the authorities that a suit by the plaintiff is not maintainable. The Subordinate Judge, when he speaks of the suit being defective on the ground of its being a champerty suit, is not using accurate language. The suit was defective independently of that upon the ground given by the Judicial Committee of the Privy Council in its judgment. It may also be said that the facts stated are certainly such as to show that it would be contrary to public policy to allow this suit to be maintained; for, according to the statement of the Subordinate Judge, it is the case of a man who from vindictive feelings, having been defeated in a former suit, seeks out persons who he thinks can

* 20 W. R., 446.

Digitized by Google

establish a claim to the property, and prevails upon them to assign to him their supposed rights. It would be contrary to public policy to allow a proceeding of that kind. The appeal must be dismissed with costs.

The 11th January 1875.

Present:

The Hon'ble W. Ainslie and Romesh Chunder Mitter, *Judges.*

Issues—Special Appeal—Appeal by one Defendant—Jurisdiction.

Case No. 1761 of 1874.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 10th April 1874, reversing a decision of the Sudder Moonsiff of that district, dated the 3rd May 1873.

Chunder Monee Dossee (Plaintiff) *Appellant,*

versus

Modhoo Dey and others (Defendants) *Respondents.*

Baboos Bhowanee Churn Dutt and *Golab Chunder Sircar* for Appellant.

No one for Respondents.

Where the Lower Appellate Court did not state in its judgment the real question to be determined in the case, and did not examine the evidence adduced by the plaintiff with reference to the issues laid down by the first Court, which were the right issues in the case, the High Court, in special appeal, made an order of remand for retrial.

Where the decision of the first Court did not proceed on a ground common to all the defendants, it was held that the Lower Appellate Court was not competent, on the appeal of one of the defendants alone, to reverse the whole decree passed against all of them.

Mitter, J.—This was a suit brought by the plaintiff to recover possession of a piece of land measuring 2½ beegahs. The plaintiff alleged that the property originally belonged to one Koora Ram, that is, the defendant No. 2; that he purchased this property from Koora Ram on the 19th Aghran 1278; that it having been in possession of the defendant No. 1 Modhoo Dey as tenant, the plaintiff brought a suit for arrears of rent, but Modhoo Dey setting up a title of two other persons, the defendants Nos. 3 and 4, that suit was dismissed; and that therefore the present suit has been brought against Modhoo Dey and the defendants Nos. 3 and 4, who were alleged to be the owners of the land, for possession. The defendant No. 1 Modhoo Dey adheres to his allegation made in the rent suit. The defendant No. 4 Doorga Monee alleges that a portion of the land in dispute, namely, a beegah and half of which she gives the boundaries in her written statement, never belonged to Koora Ram, the vendor of the plaintiff; that it was the property of one Kashee Nath; that she purchased it from him; and that neither Koora Ram nor the plaintiff was in possession of this land within twelve years. The defendant No. 3 disclaims any connection with the remainder of the property, namely, that which is not claimed by Doorga Monee. She says that she has nothing to do with the land claimed and that she did not dispossess the plaintiff. In fact, she in a written statement filed by her and Koora Ram jointly, admits Koora Ram's title to this piece of land.

Upon all these allegations of the parties, the Moonsiff laid down two issues, namely, first, whether the claim is barred by the law of limitation; second, whether up to the date of the plaintiff's purchase, the defendant Koora Ram was the owner and in possession of the lands in dispute by realizing rent from the defendant Modhoo Dey. Upon both these issues the Moonsiff came to the conclusion that the plaintiff's case was made out, and passed a decree in favor of the plaintiff. Against this decree the defendant No. 4 Doorga Monee alone appealed, and the Judge has decreed her appeal, and also dismissed the plaintiff's suit wholly.

It appears to us that the judgment of the Lower Appellate Court cannot stand. The Judge begins by saying that "the question in this case is as to which of these alleged purchases is a genuine transaction." And then he examines the evidence bearing upon the question of the genuineness of those purchases, and decides it in favor of Doorga Monee and against the plaintiff. It would appear from what has been said above that the question as to the genuineness of the plaintiff's purchase was never put in issue in the first Court. The defendant Doorga Monee never raised that question, and it was very rightly not put in issue by the Moonsiff. Therefore, it is clear that the Judge has not stated in his judgment the real question which he had to determine in this case. This being so, it is also clear that the Judge has not examined the evidence adduced by the plaintiff with reference to the issues laid down by the Moonsiff, which we think to be the right issues in the case. It is true that the Judge, in deciding

Digitized by Google

the question which he thought to be the real question, namely, whether the plaintiff's kobala is genuine or not, has referred also to the evidence which the plaintiff has adduced in this case upon the issues laid down by the Moonsiff. But we think that as the Judge was in error in supposing that the question before him was as to the genuineness of the plaintiff's purchase, he probably thought, after having come to the conclusion that the plaintiff's title was not made out, his kobala not having been proved to his satisfaction, that the other question, namely, the question of the possession of Koora Ram was not a very material point. Being of this opinion, he, it appears to us, has not examined the evidence upon that part of the case very minutely which he would have done if he had rightly apprehended the real issues between the parties. That appears to us to be the case, because the Moonsiff in his judgment refers to several circumstances which throw considerable suspicion upon the defendant's case, which may, on further examination of the evidence, be shown by the defendant to be unfounded, but the observations in the judgment of the Moonsiff based upon this, if not shown to be unfounded, would go to throw considerable suspicion upon the evidence adduced by the defendant. These circumstances do not appear to have been noticed by the Judge in his judgment. It can only be accounted for by supposing that he thought that the question as to possession was not very important, after he had found upon the other question, namely, as to the genuineness of the kobala against the plaintiff. This being so, we think that the Judge has not tried the two issues laid down by the Moonsiff, and the case ought to go back as far as Doorga Monee's appeal before the Judge is concerned. But the Judge has not only decreed Doorga Monee's appeal, but has dismissed the plaintiff's suit wholly. There was a decree passed by the Moonsiff, not only against Doorga Monee, but also against the defendant No. 3 and the defendant No. 1 Modhoo Dey, so far as the land claimed by Modoo Dey as belonging to the defendant No. 3 is concerned. There was no appeal before the Judge by any party with reference to this part of the decree, and on the appeal of Doorga Monee alone we think the Judge was not competent to reverse the whole decree passed, not only against Doorga Monee, but also against the defendants Nos. 1 and 3. The decision of the Moonsiff did not proceed upon a ground common to all, and therefore the Judge could have dealt with the claim of Doorga Monee alone in the appeal preferred by her. Therefore, so far as the Moonsiff has decreed the plaintiff's claim against the defendants Nos. 1 and 3, that decree ought to be held as final.

The case will be remanded to the Judge to try the appeal of Doorga Monee, with reference to the land which was claimed by her out of the whole of the land in dispute. Costs to follow the result. The respondents Modhoo Dey and Komla Monee Dossee are to bear their own costs, and the plaintiff will not be entitled to any costs of this special appeal against them.

The 12th January 1875.

Present:

The Hon'ble Romesh Chunder Mitter, *Judge.*

Case No. 954 of 1874.

Evidence—Act I of 1872 *s.* 92.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 6th February 1874, *reversing a decision of the Moonsiff of that District, dated the 23rd June* 1873.

Ram Doolal Sen (Plaintiff) *Appellant,*

versus

Radha Nath Sen (Defendant) *Respondent.*

Baboos Sreenath Banerjee and *Bhoobun Mohun Dass* for Appellant.

Baboo Doorga Mohun Doss for Respondent.

Under Act I of 1872, s. 92 no evidence of any oral agreement is admissible to vary the terms of a kobala, which is on the face of it an unconditional sale.

Digitized by Google

THE plaintiff sues to recover possession of a piece of land alleging that it was mortgaged by his ancestor to one Shib Chunder Sen in the year 1249, and that the money borrowed having been repaid with interest, he has become entitled to the relief sought for. The defendant alleges that the transaction in 1249 was not a mortgage, but a complete sale. The document executed in 1249 has been produced, and is admitted to be genuine. The plaintiff has given oral evidence to show that the aforesaid document is, as alleged by him, a mortgage deed, and that though executed in 1249 possession of the land in dispute remained with his ancestor till 1265, when it was made over to the defendant for the realization of the money lent with interest from the usufruct. The Moonsiff decreed the claim, but the Subordinate Judge has reversed that decree holding that oral evidence is not admissible to vary the terms of a contract reduced to writing, and that the particular arrangement under which the possession of the land is alleged to have been transferred is not proved.

Several objections have been urged in special appeal, but I am of the opinion that any consideration of them is quite unnecessary by reason of the provision of Section 92 of the Evidence Act. The document, *viz.*, the kobala of 1249, being on the face of it an unconditional sale, no evidence of any oral agreement is admissible to vary its terms. The only point upon which evidence was receivable was the alleged arrangement by which possession was said to have been transferred in 1265. But the Lower Appellate Court having considered the evidence adduced on this point has come to the conclusion that it has not been established to its satisfaction. For these reasons, I think that the judgment of the Lower Appellate Court is not open to be questioned in special appeal which accordingly will be dismissed with costs.

The 12th January 1875.

Present:

The Hon'ble Romesh Chunder Mitter, *Judge.*

Rent Suit—Intervenor—Title.

Case No. 1020 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Nuddea, dated the 12th February 1874, reversing a decision of the Moonsiff of that district, dated the 9th May 1873.

Kattyanee Debia (Intervenor, Defendant) *Appellant,*

versus

Grish Chunder Banerjee (Plaintiff) *Respondent.*

Baboo Bipro Doss Mookerjee for Appellant.

Baboo Gopee Nath Mookerjee for Respondent.

A suit for arrears of rent, in which an intervenor, who was made a defendant, claimed the land as lakhiraj, having been dismissed by the first Court, the judgment was reversed in appeal and the land declared to be mal. From this decision the intervenor preferred a special appeal:

HELD that, as the interest which the intervenor claimed was in the land, and not in the rent which was the subject of the suit, the decree (if the plaintiff should obtain one) would not be prejudicial to her. It was held also that she should not have been made a party, and so much of the Lower Appellate Court's judgment as decided the question of title against her was set aside.

THIS was a suit brought by the plaintiff for arrears of rent originally against Chunder Bhoosun Sircar and others, but one Kattyanee Debia intervened, who is the special appellant in this case. Her allegation was that this was a collusive suit between the plaintiff and the defendants; that the land, the rent of which was claimed by the plaintiff was not really mal land; but that it was lakhiraj

Digitized by Google

land belonging to the defendants; that they sold this piece of land to the intervenor; and that the plaintiff is not entitled to a decree. It appears that she was made a defendant in the first Court, and the Moonsiff dismissed the plaintiff's suit. On appeal the Judge has reversed that judgment, holding that the plaintiff's allegation has been made out; that the land the rent of which was claimed is mal land; and that the intervenor's allegation that it is lakhiraj land is not proved.

The intervenor, Kattyanee, has preferred this special appeal. The pleader for the special appellant rising to argue the case, the pleader for the respondent has taken a preliminary objection that Kattyanee, the special appellant, has no *locus standi;* that no decree has been passed against her; and that the suit has been decreed only against the original defendants, the tenants. In support of his contention he has referred to two cases to be found in the 16th Weekly Reporter, p. 132, and 17th Weekly Reporter, p. 176. It appears to me that the case, reported in the 16th Weekly Reporter, p. 132, exactly applies to this case, and I fully agree with the view of the law taken in that decision. The intervenor, Kattyanee, does not claim any interest in the subject of the suit, which was the rent claimed by the plaintiff as due from the defendants. She claims an interest in the land, and the decree, if the plaintiff succeeds in obtaining one against the original tenants, would not be in any way prejudicial to the intervenor. Therefore, for the reasons stated in that decision with which I fully agree, I think that the intervenor should not have been made a party to the suit. The pleader for the special respondent admits that the Judge should not have entered into the question of Kattyanee's title in this case, because it was not necessary. Upon that admission, therefore, so much of the judgment as decides that question against Kattyanee must be struck out. The plaintiff's decree is to be limited to a decree for rent as passed only against the tenant defendants. The special appeal will be dismissed, each party paying his own costs.

The 14th January 1875.

Present :

The Hon'ble Romesh Chunder Mitter,
Judge.

Appellate Court—Issues.

Case No. 1524 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Midnapore, dated the 17th April 1874, modifying a decision of the Moonsiff of that district, dated the 1st March 1874.

Ram Narain Roy (Plaintiff) *Appellant,*

versus

Nil Monee Adhikaree and others (Defendants) *Respondents.*

Baboos Ashootosh Dhur and *Rash Beharee Ghose* for Appellant.

Baboo Obhoy Chunder Bose for Respondents.

A point on which no question has been raised in the first Court and which is not in the line of defence taken there, should not be put in issue by the Appellate Court.

It is unnecessary to refer to any other grounds of special appeal except the third. The other grounds urged before me raise only questions of fact, and therefore I do not think that I can deal with them in special appeal. The third ground raises the following question, namely, that the defendant's defence being simply that the land in dispute was not the jote land of Rajoo Chapree, the only issue which was laid down by the Moonsiff with reference to this matter was whether the land in dispute did appertain to the jote land of Rajoo Chapree or not? and that therefore the Lower Appellate

Digitized by Google

Court was wrong in entertainiug the question whether the jote pottah of Rajoo Chapree was binding upon two of the defendants Banee Adhikaree and Nitto Adhikaree, who were minors at the time when the pottah was granted. It appears to me that this contention is valid. There having been no issue upon this point, and the defendants not having taken this line of defence, the Lower Appellate Court was not right in allowing this question to be raised at the appellate stage of the case, and therefore the order of that Court dismissing the plaintiff's claim so far as the interests of these two defendants are concerned is not right. But at the same time the minors ought not to be prejudiced by any laches on the part of their guardians; and therefore it appears to me that the proper course in this case is to remand it to the Court of first instance with a view that an issue may be raised on this question and the parties may be allowed to adduce fresh evidence upon it. I find in the decree of the first Court that Banee is put down as a major, and therefore it is contended by the special appellant that so far as Banee is concerned, he not having raised this defence, the case ought not to go back with reference to his share. But I also find in the written statement that has been filed in this case that Banee is described as a minor, his mother appearing as guardian on his behalf. The Moonsiff allowed this written statement to be put in, and I must presume, therefore, that he was satisfied that at that time Banee did not attain majority. For these reasons I think that the decree of the Lower Appellate Court, in so far as it dismisses the plaintiff's claim with reference to the land marked B. B. and C. C. in the plan prepared by the Civil Court Ameen in this case, will stand. Similarly, so far as the decree of the Lower Appellate Court awards to the plaintiff one-third of the land A. A. that will also stand. The case will go back to the Court of first instance for the adjudication of this issue, namely, whether Banee and Nitto Adhikaree are bound by the jote pottah granted to the plaintiff's predecessor Rajoo Chapree. According to the result of the trial of this issue, the case will be decided with reference to the claim of two-thirds of that portion of the disputed land which is marked A. A. Under the circumstances each party will bear his own costs of this special appeal.

The 14th January 1875.

Present:

The Hon'ble W. F. McDonell, *Judge.*

Registration—Unstamped Documents—Act VIII of 1859 s. 350.

Case No. 523 of 1874.

Special Appeal from a decision passed by the First Subordinate Judge of Mymensingh, dated the 11th December 1873, reversing a decision of the Moonsiff of Attiah, dated the 16th June 1873.

Hur Chunder Ghose and others (Defendants) *Appellants,*

versus

Wooma Soonduree Dossee (Plaintiff) *Respondent.*

Baboo Bhoobun Mohun Doss for Appellants.

Baboos Issur Chunder Chuckerbutty and *Kishen Dyal Roy* for Respondent.

A kubooleut executed whilst Act XVI of 1864 was in force need not be registered.

A document once received without objection should not be rejected on appeal because it is not stamped, when the irregularity does not affect the merits of the case.

THE point raised in special appeal in this case is whether a kubooleut is receivable as evidence in that it had not been registered or stamped. It was argued that under Section 17 of Act VIII of 1871, as this document was executed after the passing of Act XVI of 1864, it must be registered. It is quite true that in Act VIII of 1871 and in Act XX of 1866, a lease is defined as including "a counterpart, a kubooleut, an undertaking to cultivate or occupy," but it has been held by this Court on the 8th of May 1868 (see Volume IX Weekly Reporter, page 537): that a kubooleut is not a lease within the meaning of Section 13, Act XVI of 1864: consequently the document in this case which was a kubooleut and was executed whilst Act XVI of 1864 was in force, need not be registered.

Secondly, it was urged that this document was inadmissible as evidence unless it was stamped. It has been frequently held by this Court that a document once received without objection should not be rejected on appeal when the irregularity is one not affecting the merits of the case under Section 350 of Act VIII of 1859. The special appeal in this case is therefore dismissed with costs.

Digitized by Google

The 5th January 1875.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Act VIII (B.C.), 1869 *s.* 102—*Special Appeal—Jurisdiction—Bengal Council.*

Appeal under Section 15 *of the Letters Patent from a decision passed by the Hon'ble Romesh Chunder Mitter, one of the Judges of this Court, on the* 15*th September* 1874, *in Special Appeal No.* 1032 *of* 1874, *from a decision of the Judge of East Burdwan, dated the* 14*th January* 1874, *affirming a decision of the First Moonsiff of that district, dated the* 29*th October* 1873.

Poorno Chunder Roy (Plaintiff) *Appellant*,

versus

Kristo Chunder Singh and others (Defendants) *Respondents*.

Baboo Rash Beharee Ghose for Appellant.

Baboo Gopal Lall Mitter for Respondents.

Act VIII (B.C.) of 1869 gives jurisdiction to Civil Courts to try suits brought for any cause of action arising under that Act; but it is a jurisdiction to try them according to the Code of Civil Procedure except where it is otherwise provided by the Act: and Section 102 provides that there shall be no special appeal in rent suits for an amount under Rs. 100 except in certain circumstances.

Quære.—Has the Bengal Legislative Council power to give to the High Court any appellate jurisdiction not conferred by the Charter?

The judgment appealed from was as follows:—

UNDER the provisions of Section 102 of Act VIII (B.C.) of 1869 there is no special appeal in this case. The appeal is accordingly rejected with costs.

Judgment of the Appellate Bench.

Couch, C.J.—Before Act VIII of 1869 of the Bengal Council was passed, a suit of the description of that in which this special appeal is brought was not cognizable by the Civil Courts. The Civil Courts had a certain jurisdiction in rent suits under Act X of 1859, but such a suit as this, namely, for an amount under Rs. 100, was not cognizable by any Civil Court.

Then Section 33 of Act VIII of 1869 provides that from and after the time when the Act takes effect, the jurisdiction save as regards pending suits or proceedings of the Collectorate Courts, shall cease, and all suits brought for any cause of action arising under the former Act X of 1859 of the Governor General in Council or Act VI of 1862 of the Bengal Council are to be cognizable by the Civil Courts. And Section 34 says that save as in the Act is otherwise provided, suits of every description brought for any cause of action arising under the Act and all proceedings therein shall be regulated by the Code of Civil Procedure being Act VIII of 1859, and by such further enactment in relation to Civil Procedure as are or from time to time may be in force.

These two Sections, we think, must be read together. They form one provision, and their effect is that the Act gives jurisdiction to the Civil Courts over suits of this description, but it is a jurisdiction to try them in the manner mentioned in Section 34, namely, according to the Code of Civil Procedure except where it is otherwise provided by the Act. Then we have to see whether there is any provision in the Act which prevents a special appeal. We find this in the 102nd Section, the effect of which is to qualify the operation of Section 34. Without Section 102 it would give a special appeal, because it would make Section 372 of Act VIII of 1859 applicable to all these suits. It is not giving a complete jurisdiction, and then annexing a condition to it or taking away that which had been given, but it is only, if it may be so described, a qualified gift of jurisdiction, a giving of jurisdiction to the Civil Courts to a certain extent, namely, to the extent of enabling them to try these suits in the way authorized by the Code of Civil Procedure except where a special appeal is taken away by Section 102. We must follow the rule that in interpreting an Act of the Legislature we must not take one Section only and see what its meaning is, but must take all the Sections which relate to the same subject-matter. We must look at the Act as a whole, and see what was the intention. Here it was clearly the intention of the Legislature that in small cases, such as the present, there should not be a special appeal except under certain circumstances which do not exist in the present case.

It was argued that it was doubtful whether the Bengal Legislature had power to give any jurisdiction to the High Court to hear an appeal in a case in which the Court had not jurisdiction by virtue of the Charter. If

Digitized by Google

this were so, it would be fatal to the case of the appellant, for there could be no special appeal at all. It does not appear to us that there has been any infringement of the Charter, or doing what is prevented by it. The Charter of 1865 gives to the High Court all the appellate jurisdiction which it had at the time it was published. It is not necessary for us now to determine whether the Bengal Legislative Council had the power to do this. Cases have been frequently decided in this Court upon the supposition that Section 102 is law, and that the Bengal Council had power to make such a law. When it becomes necessary to determine that question it may be considered. At present, we say nothing about it. But we wish it not to be understood that by abstaining from expressing any opinion on this point, we at all favor the doubt which has been suggested as to the power of the Bengal Legislative Council.

The appeal must be dismissed with costs.

The 6th January 1875.

Present:

The Hon'ble W. Ainslie and Romesh Chunder Mitter, *Judges.*

Amendment of Plaint—Issues.

Case No. 1480 of 1874.

Special Appeal from a decision passed by the Judge of Cuttack, dated the 2nd April 1874, *affirming a decision of the Subordinate Judge of that district, dated the 30th May* 1873.

Doorga Narain Bose (Defendant) *Appellant,*

versus

Brojo Kishore Ghose (Plaintiff) *Respondent.*

Mr. H. E. Mendies for Appellant.

Baboo Rajender Nath Bhutt for Respondent.

In a suit for possession where plaintiff described himself as the son of B, and defendant alleged that the land never belonged to B, but had been settled in the name of an idol, and was now in the possession of one S, from whom he (defendant) held it under a lease and mortgage deed, the plaintiff on the day on which the suit was finally disposed of, petitioned that he was the son of S, and had his plaint amended accordingly:

HELD, that defendant ought to have been allowed an opportunity to make his defence upon the new allegation, and upon that defence new issues ought to have been recorded if necessary and further evidence taken.

Mitter, J.—IN this case the plaintiff sued to recover possession of two maus, one goonth, and four biswas of rent-free land on the allegation that he has been dispossessed by the defendant from the beginning of the year 1273. In the original plaint the plaintiff described himself as the son of Bishambhur Ghose. The defendant in his defence alleged that the land never belonged to Bishambhur Ghose; that it was settled in the name of an idol which had been destroyed long since; that it was in possession of one Sham Kishore Ghose; and that he, the defendant, holds the land under a lease and a mortgage deed from Sham Kishore Ghose. He virtually denied the plaintiff's right to this land as being the son of Bishambhur Ghose. It appears that the date fixed for the hearing of this case was the 4th of April 1873; the case was not finally determined on that date, and on the 30th May following a petition was presented by the plaintiff alleging that he was the son of Sham Kishore Ghose and he prayed to obtain the leave of the Court to amend the plaint accordingly. The defendant on that date being examined admitted that the plaintiff was the son of Sham Kishore Ghose. Upon these allegations the following issues were laid down by the Subordinate Judge. *First*—Is the suit barred by limitation? *Second*—Did Sham Kishore Ghose grant a lease in perpetuity for any portion of the land now in dispute to defendant's father, and if so, is that lease binding on the plaintiff, the son of Sham Kishore? *Third*—Will the Moonsiff's decree of the 27th December 1861 justify the defendant's refusal to surrender possession of the disputed land to the plaintiff? On the first issue, the Subordinate Judge was of opinion that the plaintiff's suit was not liable to be dismissed, because he held that the defendant did not allege an adverse but a subordinate title, the question of limitation could not arise. On the second issue, he held that the defendant has failed to prove the lease, and even if there had been any lease granted by Sham Kishore that lease would not be binding upon the plaintiff, the son of Sham Kishore, because the plaintiff did not claim through Sham Kishore; but his title is quite independent of the right of Sham Kishore, the plaintiff claiming the property in dispute as the

Digitized by Google

shebait of an idol. It is unnecessary to refer to the decision of the Subordinate Judge upon the third issue, because in special appeal nothing turns upon that part of his judgment. This judgment has been confirmed by the District Judge.

In special appeal the first ground taken is this that the Lower Courts were wrong in the adjudication of the plea of limitation. It appears to me that if the view of the Lower Courts on the question of limitation is right, the plaintiff's suit was liable to be dismissed upon another ground, namely, that the defendant holding the property both as a mortgagee and a tenant, could not be dispossessed unless his rights both as a mortgagee and a tenant were legally terminated. The plaintiff in his plaint does not state any ground nor have the Lower Courts assigned any reason to hold that his rights have been so terminated. Therefore, it was necessary for the Lower Courts to determine clearly upon the facts and upon the evidence which might have been adduced by the parties, whether the defendant was actually holding under a subordinate right. If he did, the plaintiff's suit ought to have been dismissed upon the ground mentioned above. If, on the other hand, his subordinate rights were made out, then the plaintiff to save his claim from the operation of the law of limitation would have been bound to establish that his suit had been commenced within twelve years from the date of his cause of action.

It has been further contended in special appeal that the special appellant has been prejudiced by the Subordinate Judge allowing the plaint to be amended on the day on which the case was finally disposed of. It is true that the defendant admitted that the plaintiff was the son of Sham Kishore; but at the same time this amendment raised other questions upon which it appears the judgment of the Subordinate Judge ultimately turned,—questions upon which the defendant had no opportunity of making his defence. I refer to his decision upon the second issue, because if the plaintiff was the son of Sham Kishore, and if he claimed this property by right of inheritance from Sham Kishore, the lease and the mortgage granted by Sham Kishore would be binding upon the plaintiff. If, on the other hand, the plaintiff claimed the property as the shebait of the idol, certainly the judgment of the Subordinate Judge was perfectly correct, and neither the lease nor the mortgage transaction would be binding upon him. Therefore upon those new allegations the defendant ought to have been allowed an opportunity to make his defence, and upon that defence if necessary new issues ought to have been raised. That not having been done, we think that the judgments of the Lower Courts are erroneous, and the case ought to be remanded to the first Court to allow the defendant to make his defence, with reference to the new allegations made by the plaintiff in his petition of the 30th May 1875, and if necessary to record fresh issues and decide the case upon taking further evidence upon those issues, if the parties are desirous to adduce any such evidence. Costs will abide the result.

Ainslie, J.—I concur.

The 7th January 1875.

Present:

The Hon'ble W. Ainslie and Romesh Chunder Mitter, *Judges.*

Act XIII of 1848—*Survey Award.*

Case No. 984 of 1874.

Special Appeal from a decision passed by the Officiating Judge of West Burdwan, dated the 4th February 1874, *reversing a decision of the Moonsiff of Bishenpore, dated the 4th January* 1873.

Mokund Mooraree Biswas and others (Defendants) *Appellants,*

versus

Wooma Churn Mookerjee and another (Plaintiffs) *Respondents.*

Baboo Hem Chunder Banerjee for Appellants.

Baboo Ashootosh Mookerjee for Respondents.

Act XIII of 1848 operates in certain cases to give to a survey award the full effect of a decree of a Civil Court, by taking away from the Courts the power of entertaining any suit for contesting the justice of such award after a limited time.

Ainslie, J.—It appears to us that it is impossible to draw any distinction between a survey award which has not been questioned, and which, under Act XIII of 1848, has become final, and a decree in an ordinary suit. The learned pleader for the special appellants has attempted to draw a distinction by pointing out that a survey award originates with an officer or Court not vested with the ordinary jurisdiction of a Civil Court. Granting this, we are of opinion that the words of Act XIII of 1848 operate in certain cases to give to a survey award the full effect of a decree of a Civil Court, by

Digitized by Google

taking away from the Court the power of entertaining any suit for contesting the justice of such award after a limited time.

Then it is further stated that the defendants have denied that Gopal Chunder Ghose was the gomastah in 1855, and that the Judge has on conjecture assumed that Gopal Chunder Ghose was the gomastah. It appears that the survey award bears the signature of one Gopal Chunder Ghose as gomastah of the Ranee, and we must assume that the proceedings of a Court of justice are correctly and properly carried out until the contrary is shown, and that all things have been rightly done. The appellants might have given evidence to show that Gopal Chunder was not the gomastah; but they have in fact only given evidence to show that another person was a gomastah in that year. Such evidence does not, in any way, prove that Gopal Chunder was not also a gomastah. Although the plaintiffs have given no evidence on this point, they have in their favor the evidence of the award itself, and it is really the only evidence upon the record. Upon that ground, we think we ought to overrule this objection also.

The special appeal must, therefore, be dismissed with costs.

The 8th January 1875.

Present:

The Hon'ble Sir Richard Couch, Kt., *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Admission—Special Appeal—Hindoo Widow—Decree—Reversioners.

Case No. 510 of 1874.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 16th December 1873, affirming a decision of the Additional Subordinate Judge of that district, dated the 17th March 1873.

Mohima Chunder Roy Chowdhry (Plaintiff) *Appellant*,

versus

Ram Kishore Acharjee Chowdhry and others (Defendants) *Respondents*.

Mr. Evans and *Baboo Mohesh Chunder Chowdhry* for Appellant.

Baboo Doorga Mohun Dass for Respondents.

Where parties allow a suit to be conducted in the Lower Courts as if a certain fact was admitted, they cannot afterwards in special appeal question it and recede from the tacit admission.

Where a suit is brought against a Hindoo widow in respect of a debt due from her husband, the decree passed, although apparently against her personally, is not to be considered as such, but as a decree against her as the representative of her husband's estate, and it may be executed as such. Where the debt has not accrued in the life-time of the husband and is not his debt, the decree against her in a suit to which the reversioner is not a party, can only be considered as a personal decree, and be enforced by the sale of her interest only, except where the proceeding is one which authorizes the sale of the tenure under Act VIII (B.C.) of 1869.

Couch, C.J.—THE plaintiff in this case sued as the vendee of one Umbika Churn to obtain possession of certain talooks, on the ground that by the sales which had been made during the life-time of Kantiporee, a Hindoo widow, only her life-interest in the property had passed, Umbika Churn being the person entitled on her death.

The sales in question were made in execution of decrees, the first being on the 5th of July 1852 upon a decree made in a suit for arrears of rent due in respect of a talook other than that which was sold, the interest of the widow being sold; the second was on the 7th of August 1865 in execution of a decree in a suit on a bond which had been given for arrears of rent.

The case first came on to be heard before us on the 16th of September last, when it was admitted that the decrees were not decrees under Act X of 1859, and it was stated that the rent, which was the subject-matter of one suit, and for which the bond which was sued upon in the second suit was given, was rent which become due after the death of Chundee Pershad.

It was contended before us by the pleader for the respondent that this had not been found by the Lower Courts, and we were asked to have the question now raised, but we are of opinion that the rent must be considered to have become due after Chundee Pershad's death.

The first Court, the Additional Subordinate Judge, after stating in the judgment what the suit was for, stated the points which arose in the suit for determination. One of them was, "when did Kantiporee die, and whether she was in possession within twelve years next before the date of the suit," and the next was, "whether the talooks were sold in public sale for legal purposes, or for the recovery of the personal debts of Kantiporee." The whole of the judgment shows that the case was treated as if the rent had become due in her time and not in the time of her husband. It is true that the defendants in their written statement say

Digitized by Google

that the rent did become due in the life-time of Chundee Pershad, but they do not appear on the hearing either before the first Court or the Appellate Court to have asked to have that question tried. On the contrary, the whole case has been allowed by the defendants to be tried in both the Courts as if the rent had become due after the death of the husband. And they cannot now, simply because they made that allegation in their written statement, be allowed to raise the question. Where parties allow a suit to be conducted in the Lower Courts as if a certain fact was admitted, they cannot afterwards in a special appeal question it and recede from the tacit admission. I acted upon this principle in the case of Devaji Govaji *v.* Godabhai Godibhai, II Bombay High Court Reports, page 28, which was appealed to the Judicial Committee of the Privy Council, and the judgment was confirmed. There being an objection that there was no evidence to connect the plaintiffs with the parties to a certain deed, I said:—"This objection was not taken in the "grounds of appeal to the Judge, and appears "not to have been taken before the Moon-"siff. The suit appears to have been con-"ducted as if this was admitted, and when "that is the case, we think an objection of "want of evidence of the fact cannot be "taken in a special appeal. Stracy *v.* Blake, "and Doe dem Child *v.* Roe are instances of "the application of this principle."

We proceed, therefore, to consider the case, assuming it to be the fact that the rent became due after the death of Chundee Pershad.

That distinguishes the present from the case in Marshall's Reports, page 614, and the decision of the Judicial Committee in the General Manager of the Raj Durbhanga *v.* Maharajah Coomar Ramaput Singh, XIV Moore's Indian Appeals, page 605.* There in a suit by A against B for arrears of rent, a decree was obtained by A against B's widow, B having died pending the suit. Under this decree execution was obtained, and the interest of the widow was sold under Act XI of 1859. The amended certificate stated that the estate was sold by virtue of the decree; and it was held, reversing the decree of the High Court, that the sale was not of the widow's personal interest, but as representatives of her husband's estate. What is laid down there and also in the case in Marshall's Reports is, that where the suit is brought in respect of a debt due from the husband, the decree against the widow, although it may be apparently a decree against her personally is not to be considered as such, but as a decree against her as the representative of her husband's estate, and the decree may be executed as such.

In the present case the debt was not due from the husband, and if the estate of the husband is to be charged either for the arrears of rent becoming due after his death, or for the land which was given by his widow, it can only be upon the ground that the debts were necessarily contracted by the widow or under such circumstances as to make the whole estate liable, and not merely the interest in it of the person who contracted them.

The suits were against the widow, and the decrees made in both were against her, and purported to be against her personally. The question whether the debts were necessarily incurred, so as to charge the estate, was not tried in either of the suits. It was not necessary for the plaintiff in either of them to prove that in order to obtain a decree. He had a right to a decree against the widow upon proving in the one case that the arrears of rent were due, and in the other that the bond was executed by her. The question upon which the liability of the estate depends could not be tried in executing these decrees; for Section 11 of Act XXIII of 1861 only authorizes the Court to try questions arising in execution of the decree between the parties to the suit. But the question here is not between the plaintiffs in those suits and the widow. It is between the purchaser at a sale in execution and the reversioner, the person entitled to the estate after the death of the widow. He was not a party to either of the suits in which the decrees were made, nor has the question been tried in the present suit. The Subordinate Judge, as we have already read, states as an issue of fact whether the talooks were sold in public sale for legal purposes or for the recovery of the personal debts of Kantiporee; but in his judgment he says:—"In the present case "the *bona fides* of the decree and of the "sale not having been impeached, it would "cast an insurmountable difficulty upon the "defendant to substantiate the prior legal "necessity on the part of the widow which "has caused the sale of the property. On "the other hand, an attempt has been made "by the plaintiff to show that the widow "had ample means for meeting the demand "of the zemindar, but certain tutored

* 17 W. R., P. C., 459.

Digitized by Google

"witnesses merely stating that she had an "income of Rs. 500 or 600 is too vague "an evidence to warrant a call upon the "opposite party to rebut the evidence by any "negative proof." That is, instead of requiring the party whose title depended upon there being a necessity for the widow to contract the debts to prove it, he merely says there would be an insurmountable difficulty to his doing so, and throws upon the other party, the reversioner, the burden of proving the contrary. This is what has occurred; there having been some time since a personal decree against the widow, the whole of the property was taken in execution and sold, and the person purchasing it is held entitled to keep it without proving the fact upon which his title depends, because, as the Subordinate Judge thinks, there would be an insurmountable difficulty in the way of his substantiating it. The question which ought to have been tried is thus left untried, and a decree has been made in favor of the defendants without any evidence on their part.

Then upon the appeal, the District Judge, instead of trying the question upon evidence, says:—"The first question which the Lower "Court should have decided on the merits "was whether there was legal necessity on "the part of the widow to incur the debts "under which the sales were made," and as to the legal necessity, he says:—"It was ruled "in a case in XVI Weekly Reporter, page 50, "that in a suit by a reversioner to set aside "a sale in execution of a decree against a "Hindoo widow, plaintiff's cause of action "depends on whether there was legal neces-"sity for the widow's incurring the debt "which burdened her husband's estate; if "there was, the entire estate would pass; if "not, her life-interest only; and the question "is,—Is the payment of rent to the "zemindar by a Hindoo widow a legal "necessity." And upon the authority of a case in XII Weekly Reporter, page 504, the Judge held that the mere fact of the claim against the widow being for arrears of rent made it a case of necessity, and without taking any evidence on the subject decided the question against the plaintiff.

The judgment referred to is that of Mr. Justice Mitter in Teeluck Chunder Chuckerbutty *v.* Muddun Mohun Joogee and others. There Mr. Justice Mitter does say that "the rent due to the zemindar cannot, "under any circumstances, be treated as a "personal debt of the widow; and if the "zemindar thought it proper to put up the "properties now in dispute for sale for the "realization of that rent, after having "obtained a decree for it in due course of "law, the reversionary heir can have no "right to come in after the death of the "widow and take back those properties from "the hands of the purchaser. If the widow "had contracted a debt to meet the zemin-"dar's demand for rent, and then alienated a "part of her husband's estate for the satis-"faction of that debt, the alienation would "have been good and valid in law; and we "do not see any reason why less effect is to "be given to a decree passed by a Court of "competent jurisdiction, in execution of "which decree certain properties belonging "to the estate of the widow's husband were "brought to sale and purchased by the "special appellant's vendor."

We have only such information of the facts of this case as can be obtained from the judgment of the learned Judge. It does not appear whether the rent which was the subject of the suit became due after the death of the husband. Possibly it did. If it did not, the case would be like the one in Marshall's Reports and in XIV Moore's Indian Appeals. But the learned Judge, when he speaks of what the zemindar might have done, probably thought that this course had been taken, and that the zemindar having obtained a decree in due course of law, it authorized the sale of the whole of the estate. If the judgment goes to the extent of holding that a decree for rent due from a widow and against her personally, can, from the mere fact of its being a decree for rent, and without any evidence, be considered as a decree for a necessary debt (the suit in which it is obtained being one to which the reversioner is not a party, and therefore has never had an opportunity of contesting whether the debt was a necessary one), it is opposed to the judgment of the Judicial Committee of the Privy Council in Nugender Ghose *v.* Sreemutty Kaminee Dossee, XI Moore's Indian appeals, page 241.* There a decree having been obtained against a widow in respect of a charge which she had made, it was held that it could only be enforced against such interest in her deceased husband's estate as she possessed. And their Lordships pointed out that if the person obtaining the decree had a right to such a decree as would affect

* 8 W. R., P. C., 17.

Digitized by Google

the estate of the husband, and be anything more than a decree against the widow personally, the suit ought to have been one to enforce the mortgage and to make it a charge upon the estate. Their Lordships say that it was impossible for them to upset the decision of the High Court which in substance only affirmed that an action brought under Section 9 of Act I of 1840 is only a personal action, and that in an action which was personal against Kaminee Dossee, as the possessor of the talook, only her property and her interest in the talook can be affected, and that an equity which the plaintiff possessed, and which she might have enforced against the owners in reversion also, cannot be enforced against them in a suit brought to extend and enforce a personal decree against the possession of the limited interest. They then say that they wish it to be understood that they leave unimpaired the general rule that "in a suit brought by a "third person, the object of which is to "recover, or to charge an estate of which a "Hindoo widow is the proprietress, she will, "as defendant, represent and protect the "estate, as well as in respect of her own as of "the reversionary interest."

This passage was relied upon before us, but it is not applicable to a suit like the present. Here, the suits upon which the decrees were obtained against the widow were not suits in which the widow could be said to represent or protect the estate in respect of the reversionary interest. Their Lordships were speaking of suits where the widow might be suing to recover property which she said was part of the estate, or where the widow might be sued for the recovery of property in her possession as part of the estate, and which she would bring or defend as representing the estate, and not only in respect of her own interest. Here the suits were against the widow only. She cannot be said to have been defending them as representing the reversioner, or as protecting his interest. She was defending on her own account, and the suits were not framed in such a way as to seek to have the whole of the estate charged. The reversioner, the person who was interested in preventing that, was not a party to the suits and had no opportunity of being heard.

The result of the authorities appears to be that were the debt has not accrued in the life-time of the husband and is not his debt, so that the widow is sued as his representative, the decree against her in a suit to which the reversioner is not a party, can only be considered as a personal decree against her, and be enforced by the sale of her interest only, except where the proceeding is one which authorizes the sale of the tenure under Act VIII (B.C.) of 1869. Here the plaintiff who sued for arrears of rent did not take the course which he might have adopted, and ask to have the tenure sold for the arrears due in respect of it. He sought and obtained something different from that; and under his decree he sold other tenures. It is found that what was sold was not merely the tenure in respect of which the rent accrued, but others. In fact, having obtained a personal decree against the widow, he executed it against any property of hers which he thought fit. We think that the Courts were wrong in treating this as a sale in execution of a decree for a necessary debt and in holding that the plaintiff is not entitled to recover. The second suit was upon a bond for arrears of rent of which a very small part was due in respect of the property which was sold in execution, and in neither case was there any proceeding under the Act VIII (B.C.) of 1869

Then the question is, what is the effect of this upon the plaintiff's right to recover. It does not appear to be disputed that the plaintiff is the reversioner. The issue was raised in the first Court whether there was a legal necessity. The defendants had an opportunity of offering any evidence upon that which they thought fit to give. It appears from the judgment that they did attempt to prove it. The plaintiff gave some evidence to disprove it, but the burden was not upon him to do this. The issue having been raised in the first Court and the defendants having had an opportunity of giving evidence upon it, and not having done so, it would not be right for us now to remand the case in order to have that question tried. Indeed, it would appear from the judgment that it would be of no service to the defendants to remand it for that purpose. But whether it would or not, it is not right that fresh evidence should be now produced, the defendants not having thought fit to give the evidence when the issue was to be tried by the first Court. The consequence is that the plaintiff has shown that he is entitled to the property the widow being dead, and the defendants, whose title depends upon the sale in execution, have failed to show that they acquired by the sales more than the right which the widow had, and which has now been determined.

Digitized by Google

The result is that the plaintiff's claim has not been met by any proof on the part of the defendants, and that he ought to have a decree for the recovery of the property with costs in all the Courts.

The 9th January 1875.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Hindoo Law—Minor Wife—Conjugal Rights

Case No. 1985 of 1873.

Special Appeal from a decision passed by the Judicial Commissioner of Assam, dated the 10th June 1873, reversing a decision of the Moonsiff of Gowhatty, dated the 20th May 1873.

Kateeram Dokanee (Plaintiff) *Appellant,*

versus

Mussamut Gendhenee and others (Defendants) *Respondents.*

Baboo Obhoy Churn Bose for Appellant.

No one for Respondents.

According to Hindoo law, after marriage, a husband is the legal guardian of his wife's person and property whether she is a major or minor.

The marriage of an infant being under the Hindoo law a legal and complete marriage, the husband has the same right as in other cases to demand that his wife shall reside in the same house as himself, except under special circumstances such as absolve the wife from the duty.

Mitter, J.—This was substantially a suit to recover possession of the person of the plaintiff's wife. It was brought against the wife, her mother, and one Puddo Lochun Dass, with whom the mother and the daughter (plaintiff's wife) were, at the time the suit was instituted, living.

The Court of first instance on proof of the marriage, which was denied by the defendants, decreed the claim. The mother Mussamut Gendbebi appealed, and the Judicial Commissioner of Assam has reversed the decree of the first Court. The following observation in the Judicial Commissioner's judgment gives the whole reason upon which the decree of the first Court has been reversed :—

"I feel confident, however, from her appearance," (*i.e.*, the alleged wife's appearance) "that at the present time she is "not much if any thing over twelve years of "age, and I am convinced that she never lived "a day with the plaintiff as his wife—a "position she seems to me, however, from "her undeveloped appearance and childish "look quite unfitted to occupy, far less to "have occupied, it a year ago."

We do not think that the reason assigned by the Judicial Commissioner is sufficient in law for dismissing the plaintiff's suit. According to Hindoo law, after marriage, the husband is the legal guardian of his wife's person and property—whether she is a major or a minor (*vide* Macnaghten's Hindoo Law, Volume I, page 104, and Colebrooke's Digest, Volume II, page 380, or Book IV, Chapter I, Section 1, pages 5 and 6). This being so, the determination of the whole case depends upon the question whether or not the marriage alleged by the plaintiff actually took place. This question has not been determined by the Lower Appellate Court, and if it be found in the affirmative, a decree ought to be given in plaintiff's favor. But upon the finding of the Judicial Commissioner, no decree should be passed in this suit against the wife who being a minor, has not been sued through her guardian. The decree ought to be given against the other defendants declaring that he, the plaintiff, is entitled to the custody of his wife's person. The question whether a suit like this will lie in a Civil Court has been authoritatively settled in the case of Moonshee Buzlool Ruheem *v.* Shumsoonnissa Begum, reported in Moore's Indian Appeals, Volume XI, page 606.*

The judgment of the Lower Appellate Court will therefore be set aside, and the case will be remanded to the Court of the Judicial Commissioner for retrial with reference to the observations made above.

Markby, J.—I concur in thinking that the ground upon which the Judicial Commissioner has disposed of this case cannot be supported. The marriage of an infant being under the Hindoo law a legal and complete marriage, the husband, in my opinion, has the same right as in other cases to demand that his wife shall reside in the same house as himself. I do not think that any Court can deprive the husband of this right except upon some tangible and definite grounds which show that under the special circumstances of the case the wife is absolved from this duty, and her parents or guardians from the duty of surrendering her to her husband: and we cannot, in my opinion say, without contravening the Hindoo law, that the

* 8 W. R., P. C., 3.

Digitized by Google

infancy of the wife constitutes such a ground, though it might, I think, be right in the case of a very young girl to require the husband to show that she would be placed by him under the immediate care of some female member of his family.

I therefore concur in the order of remand as proposed by my learned brother.

The 9th January 1875.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Conjugal Rights—Declaratory Decree—Specific Performance—Act VIII of 1859 *s.* 200.

Case No. 2221 of 1873.

Special Appeal from a decision passed by the Deputy Commissioner of Nowgong, dated the 16th June 1873, reversing a decision of the Extra Assistant Commissioner of that district, dated the 14th May 1873.

Gatha Ram Mistree (Plaintiff) *Appellant,*

versus

Mookita Kochin Atteah Domoonee (Defendant) *Respondent.*

Baboo Aukhil Chunder Sen for Appellant.

Baboo Issur Chunder Chuckerbutty for Respondent.

A decree in favor of a husband which declares him entitled to his conjugal rights, and orders his wife to return to his protection, is intended as an order to the wife to live with her husband, to remain in his house, and there to perform the duties of a wife.

Such a decree is an authoritative decision as to the existence of the relation of husband and wife between the parties, but it is not a decree for the specific performance of a contract, and it is not enforceable by the mode pointed out in the Code of Civil Procedure (Act VIII of 1859) s. 200.

Markby, J.—In this case the plaintiff sues for the restitution of his conjugal rights. The defendants (the alleged wife and her mother) denied the marriage. The first Court found that the marriage had been solemnized according to the custom of the caste to which the parties belonged, the principal feature in the ceremony being the giving of a feast to their own community. The Deputy Commissioner has reversed this decision on grounds which appear to us altogether arbitrary. He does not dispute that the ceremony took place, but thinks it does not constitute a formal marriage ceremony so as to be binding. No reasons are given for this opinion which is directly contrary to the evidence, and the consequences of such a decision might be very serious.

We, therefore, set aside the judgment of the Deputy Commissioner and order him to re-try the appeal.

This is the judgment of the Court, but I think it right to add on my own behalf some observations upon the form of the decree and the nature of the proceedings which may be taken upon it. This seems to me the more necessary, inasmuch as the first Court in this case made a decree in a form which this Court has expressly and authoritatively declared to be erroneous.

The cases in which it has been decided that a decree in favor of the husband whose marital rights are withheld ought to be made, are to be found in VI Weekly Reporter, page 105; VIII Weekly Reporter, page 467; and XI Moore's Indian Appeals, page 551.*

The decrees in the two former cases declared the husband "entitled to his conjugal rights," and ordered the wife "to return to his protection." The Privy Council did not make any decree.

Up to the point of saying that the suit will lie and of making a decree to the above effect, there is neither doubt nor difficulty. Wherever the law recognizes that the relation of husband and wife exists, it also recognizes that the husband is bound to live with the wife, and the wife with the husband, and if that obligation be denied by either of the parties to the marriage, the Courts ought certainly to declare the right to exist. If also any person should interfere and prevent the wife from returning to her husband, or the husband to the wife, there is no difficulty, as far as I can see, in punishing this invasion of the rights of others, and even in compensating the injured party to some extent. The real difficulty arises when we come to deal with a refusal to perform the conjugal duties by one of the parties to the marriage after the existence of the matrimonial relation has been ascertained.

It appears to have been, at one time, thought that in this country the duty of cohabitation should be enforced by seizing and making over the recreant party bodily to the claimant, and cases are mentioned in which this has been directed in the case of a wife refusing to return to her husband. I am not aware of any case in which it has been suggested that similar

* 8 W. R., P. C., 3.

Digitized by Google

violent measures should be taken against a husband refusing to receive his wife; and the cases in which a wife has so been treated are obviously based upon the notion that the husband purchases the wife at marriage, and that she thereby becomes an article of his property. Widely as this notion has prevailed in the world, I need scarcely say that it is wholly abhorrent to the Hindoo law.

In what way then is the decree to be enforced? As far as I have been able to discover, there is but one recent case direct upon this point; and as I am unfortunately unable to agree with the opinion there expressed, greatly as I respect it, I feel myself bound to consider the question at some length.

Mr. Justice Macpherson, in the case reported in VI Weekly Reporter, p. 105, after expressing his opinion that the person of the wife cannot be taken in execution, says that "a suit will lie for a declaration that "the husband is entitled to his marital "rights, and for an order that the wife do "return and live with him. Such an order "is an order 'for the performance of a "particular act' within the meaning of Sec- "tion 200 of Act VIII of 1859, and if the "wife refuse to obey it, the decree may be "enforced, as that Section provides, by the "imprisonment of the wife, or by attachment "of her property, or by both imprisonment "and attachment."

Mr. Justice Seton-Karr in the same case adhered to the view that the wife could be delivered over bodily to the husband in execution. Mr. Justice Jackson concurs with Mr. Justice Macpherson in thinking that there can be no delivery of the body of the wife to her husband. This judgment, however, is not quite so explicit as to the mode in which the decree is to be enforced, and no doubt that question was not, strictly speaking, under judicial consideration.

Assuming, as laid down in that case and in the case reported in VIII Weekly Reporter, p. 467, that the decree ought to contain an order to the wife to return to her husband's protection, still I doubt whether such an order is an order for the performance of a particular act within the meaning of Section 200 of the Code of Civil Procedure. I think some meaning is to be given to the word "particular," and an order to a wife to return to her husband's protection cannot in my opinion be called an order for the performance of a particular act. It clearly could not be said that such a decree would be obeyed simply by a return to the husband's house only. I think the decree is intended as an order to the wife to live with her husband, to remain in his house, and there to perform the duties of a wife. Now, if we accept the view that marriage is a contract, and that such an order is an order for specific performance of a contract, we are at once met by this difficulty that it would be contrary to well-established principles that such a decree to be so enforced should be made at all. It is not, I believe, considered to be within the province of the Court of Chancery in England, and I have no reason to believe that it is within the province of the Courts here, to decree specific performance of continuous duties which the Court has no means to enforce except by repeated infliction of fine and imprisonment. This I understand to be the opinion expressed by the Lord Chancellor Cranworth in Blacket v. Davis, L. R. Eq., Vol. I, page 117, overruling the decision of Wood, V.-C, who had attempted to do something of the kind, but which attempt the Lord Chancellor characterized as "perfectly novel." This seems to be in accordance with previous decisions. There is, no doubt, a good deal of discretion in such cases, but I do not think a contract of marriage could possibly be enforced without taking a very different view of the powers of the Courts of this country from that taken of their own powers by English Courts of Chancery. The case most like this is that of contracts of partnership which are not specifically enforced; the reason frequently given being that it would be like attempting to enforce a contract of marriage (Lindley on Partnership) Moreover, though I feel bound emphatically to dissent from the opinion of Mr. Justice Seton-Karr, that a wife's person can be seized in execution of decree, I think there is force in his observations on the proposed proceedings under Section 200, where he says:—"Nor do I think that the provision "for imprisonment of the party (in Section "200) against whom the decree is made, and "for attaching his property ought, or was "intended, to apply to such a case. Surely, "it would be a harder course to imprison a "reluctant wife than to deliver her to her "husband who wishes to cohabit." Mr. Justice Seton-Karr seems to have thought that if you are to compel the woman to cohabit at all, then the direct way of doing so by delivering her person to her husband is not more inhuman and infinitely more effec-

Digitized by Google

tual than throwing her into prison, and so far I am disposed to agree with him.

It appears to me, however, that such a decree cannot be considered as one for the specific performance of a contract at all. I am not unwilling to look upon marriage as a contract, but I do not think it is a contract which Courts of law would be wise to undertake specifically to enforce. I think the case is one of an entirely exceptional kind. The Privy Council (XI Moore, 551)* have held that a suit for the restitution of conjugal rights will lie. I do not think any stress should be laid on the term "restitution of conjugal rights," as there used, or that it expresses in any way definitely what sort of a decree should be given, or what proceedings can be taken subsequent to decree. This decision, so understood, I cheerfully accept because it appears to me that it is absolutely necessary that a husband and wife should have some means of obtaining an authoritative decision as to whether or no they really stand in that relation. If a decision cannot be obtained binding on all the world, it is at least desirable that one should be obtained binding upon themselves, and upon which other persons may act with a reasonable degree of safety. But I consider the Privy Council to lay down no more than that a suit to ascertain the existence of this relation can be maintained; and carefully to abstain from laying down any final propositions of law upon the exact form of decree or exact mode of enforcing the decree. All the rest of the judgment is intended, as I understand it, to call attention to the importance and gravity of the matter, and to overrule emphatically the contention then put forward at the bar that no suit of the kind would lie in India at all.

I do not, indeed, think it likely that any one will contend that the bare declaration of the existence of the relation, even if not "relief" in the technical sense of that term, is not of the greatest value and assistance to the parties: what seems to be considered is that the Courts *must*, in order to be logically consistent, follow up this declaration with all the powers which they possess.

That the Courts, however, are not hemmed in by any such absolute necessity is, I think, indisputable. The simplest and most direct, and indeed the only really effectual, mode of enforcing the obligation, and, therefore, the one to be adopted, if the Courts have no discretion in the exercise of their power, is to bring the parties together by force. But this has been universally repudiated, not only in India, as is above shown, but in every other country as shocking to our feelings of humanity. The alternative of forcing the recusant party into compliance by imprisonment is a course which to my mind has little to recommend it by comparison, and though not quite as universally condemned has also been very generally repudiated. During the anxious enquiry which I have thought it my duty to make upon this subject, I have ascertained that, upon the continent of Europe, the right both of the husband and of the wife to cohabitation (in the etymological sense) the husband selecting the place of residence, is everywhere considered as altogether beyond dispute. So also is the right to proceed against and to punish any third person who detains a wife from her husband: so also is the right of the husband to maintain a suit against the wife if she refuses to acknowledge the marital rights. But all attempts at enforcing this duty by compulsion have been abandoned or very nearly so. The only trace of compulsion which I have found is in some smaller states of Germany, where a very small fine or a few day's simple confinement of the woman appears to be allowed. If this produces no effect, no further punishment can be inflicted. The Prussian Courts have expressly decided that no direct compulsion whatever can be applied. The matter has been the subject of considerable discussion in Austria and in France. In the latter country I am informed on the highest authority that the question has been settled against the use of compulsion. In Austria I am not sure that the question has been finally set at rest, but I have reason to believe that the leaning is strongly against the use of any such means.

If we consider the law of England, I think the difficulties about the Civil Court attempting to enforce by compulsion the observance of conjugal duties are in no way lessened. Perhaps some persons would be inclined at first sight to treat the law of England as affording an example of the almost unbounded exercise of judicial power in this direction: and if we look to forms and words only, it is so. The old ecclesiastical Courts, that is, the Church, claimed to have the power to enforce specifically the performance of conjugal duties in their minutest particulars, and gave decrees accordingly. But inasmuch as these Courts soon found that they had no effectual independent power of

* 8 W. R., P. C., 3.

Digitized by Google

enforcing their decrees when pronounced (3 Black. Comm., 101), this claim was not so substantial as at first sight appears. I am unable to find any exact information in any books available to me as to the exact proceedings which could be taken upon the decree of an ecclesiastical Court for the restitution of conjugal rights. Undoubtedly, the ecclesiastical Courts had a right to call in the ordinary civil power in aid of its own weak authority (Black., *ubi supra*), but whether from the difficulty of the procedure, or the contempt entertained for those who invoked the assistance of the Court for such purposes (3 Black., 94), such extremities were, I believe, very rarely proceeded to. No doubt, the Court which now exercises jurisdiction in matters matrimonial in place of the old ecclesiastical Courts has the same power of enforcing its decrees as the Court of Chancery, but I can only find three cases in the reports since the new Court was established in which writs have been actually issued. It is significant that, in two of these cases, the recusant party had already escaped out of the country.

But surely when we look to the law of England for a guide, it is where that law is in harmony with the general principles of equity and jurisprudence that we should adopt it; not where it is exceptional. That the English law, on the subject of enforcing conjugal rights, is exceptional, I have no manner of doubt. It is based on the canon law or the law of the Church, and as far as I can gather, the following are the propositions which that law maintained:—(1) that all sexual intercourse, except between husband and wife, is a mortal sin; (2) that marriage is a divine institution entirely under the control of the Church; (3) that all marriages not sanctioned by the Church are unlawful; (4) that divorce is impossible; (5) that the Church can release the parties from their conjugal duties; and (6) that they can enforce these duties in the minutest particulars. The law of England has, in modern days, to a very great extent, rejected these pretensions and modified these views, but they have not as yet been radically removed: rather, however, in my opinion, because they produce but small practical evils than from any approval of the principles on which they rest.

The state of the law in America seems to me to show very cleary how repugnant it is to the principles which govern the ordinary Civil Courts to attempt to enforce the performance of conjugal duties by compulsion. The Common Law of America on the subject of marriage is the law as it stood in England when those colonies were founded: including, therefore, the law of marriage as administered in the ecclesiastical Courts and based originally upon the canon law. But the colonies, though they take the law of the mother country, do not take her Courts, and there never have been in America Courts of ecclesiastical jurisdiction. Solely, therefore, because no Court has been specially vested with the particular power of enforcing the performance of conjugal duties, no Court in America ever has enforced those duties, and that part of the law has in fact become obsolete. (See Bishop on Marriage and Divorce, Volume I, Chapter 4, *passim*). Nothing could show more strongly how completely this portion of the English law stands apart from the ordinary law of the country.

It appears to me, therefore, that if we were to hold that a Court could enforce the continuous performance of conjugal duties by unlimited fine and imprisonment, we should place the law of this country in opposition to the law of the whole civilized world, except the ecclesiastical law of England. That the ecclesiastical law of England is not binding upon, or suitable to, the non-Christian inhabitants of this country, even where there is jurisdiction to apply it, is fully shown by the decision of the Privy Council in IV Weekly Reporter, 91. The remedy for matrimonial grievances must (as there shown) be applied by the ordinary Civil Courts acting upon ordinary legal principles, and applying the law of the community to which the parties belong. There is nothing which leads me to suppose that the Hindoo law is less humane in this matter than that of other civilized countries, or that severer remedies are required here in case of matrimonial differences than have been found effectual elsewhere.

For these reasons, although I think that the existence of the relation of husband and wife ought to be enquired into in this case, and if it exists declared, and though I think there is no reason why the decree should not order the wife to return to her husband's protection, as has been done in the other cases, and as her duty clearly is, yet I cannot give my assent to the proposition that this decree is enforceable by the mode pointed out in Section 200 of the Code of Civil Procedure. That question has not yet formally arisen for determination, but as in the other cases, whilst making a decree, an opinion has been expressed as to how it is to be enforced, I have thought it right to express my opinion also.

Mitter, J.—I concur.

Digitized by Google

The 9th January 1875.

Present :

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Execution Proceedings—Act VIII of 1859 *s.* 246—*Limitation—Act IX of* 1871, *sch. II, art.* 167.

Case No. 153 of 1874.

Miscellaneous Appeal from an order passed by the Officiating Judge of Dinagepore, dated the 18*th April* 1874.

Booboo Pyaroo Tuhobildarinee (Decree-holder) *Appellant,*

versus

Syud Nazir Hossein (Judgment-debtor) *Respondent.*

Mr. J. S. Rochfort and *Baboo Sreenath Doss* for Appellant.

Baboos Kalee Mohun Doss and *Bhowanee Churn Dutt* for Respondent.

The effect of an order striking off execution proceedings in consequence of an adverse decision against the decree-holder under Act VIII of 1859 s. 246 is not to dispose finally of the application for attachment and sale. And if the result of a regular suit prosecuted with due diligence is a final decree in his favor, and he makes an application for the execution of this decree, such application, whatever its form, is in substance one for the continuation of the former proceedings, and is therefore not an application to execute the decree within the meaning of Act IX of 1871, sch. II, art. 167.

Markby, J.—In this case, certain property having been attached by the decree-holder in execution of his decree, as being the property of his judgment-debtor, a third person came forward and claimed the property under Section 246 of the Code of Civil Procedure, and on this claim the property was released from attachment, and the execution case was struck off on the 7th June 1870.

The decree-holder then at once brought a suit to have it declared that the property did in reality belong to his judgment-debtor and was applicable to the payment of his debts. That suit appears to have been prosecuted with diligence, and the decree-holder obtained a final decree in his favor on the 28th of February 1873.

On the 5th December 1873, the decree-holder again made an application for the execution of his decree, which has been dismissed on the ground that it is barred by the provisions of Act IX of 1871.

For the reasons stated by us in a case reported in XXII Weekly Reporter, page 154, we agree with the Judge that the new law is applicable.

We also think that it is clear that no application to enforce or keep in force this decree was made within three years of the 5th December 1873.

It remains, however, to be considered whether the application made on that date was a fresh application and the commencement of new proceedings, or a continuation of the former proceedings.

We think that this question must be determined by a consideration of all the circumstances of the case. If the effect of the order of the 7th June 1870, striking off the execution proceedings, be finally to dispose of the prayer contained in that application, then, undoubtedly, the subsequent application of the 5th December 1873 must be deemed to have been made for the commencement of fresh proceedings. But we do not feel compelled to say that the order of the 7th June 1870 has that effect. That order was passed in consequence of the result of the enquiry under Section 246 of Act VIII of 1859 proving adverse to the decree-holder. The Court holding an enquiry under Section 246 of Act VIII of 1859 found that the property ought not to be sold as belonging to the judgment-debtor, but ought to be released from attachment as the property of the claimant. But this investigation was not final ; it was subject to revision in a regular suit, which suit the party cast in it immediately brought. Therefore the effect of this order striking off execution proceedings in consequence of an adverse decision against the decree-holder under Section 246 of Act VIII

Digitized by Google

of 1859, was, that the decree-holder's prayer for the sale of the property claimed by the third party as his own could not be granted, unless the result arrived at, in the enquiry under Section 246 of Act VIII of 1859 were found erroneous in the subsequent regular suit brought to impugn its correctness. Consequently it was not an order finally disposing of the decree-holder's application for the attachment and sale of a particular property. Whatever may be the form of the last application dated the 5th December 1873, in substance it was an application to the Court for the continuation of the former proceedings on the ground that the bar that was set up by reason of the adverse order under Section 246 had been removed by the decision in the subsequent regular suit. For these reasons, we hold that it was not an application to execute the decree within the meaning of Schedule II, Article 167 of Act IX of 1871. It is not disputed that the original application for the execution of the decree by the attachment and sale of this particular property was made within the time allowed by the then existing law of limitation. Consequently, it follows that the decision of the Lower Court holding the decree incapable of execution as barred by limitation cannot stand. The result is that the present appeal will be decreed, and the Lower Court be directed to proceed with the execution of the decree.

The view we have taken of these proceedings is not open to the observation that the time for executing the decree in such a case thus becomes practically unlimited. Though, in the present case, we hold that the striking off the execution case did not, under the circumstances, put an end to the proceedings, we do not say that if the judgment-creditor had been dilatory or negligent in pursuing his remedy that the result would have been the same. What we hold is that having diligently pursued his remedy to get the order under Section 246 set aside, it may fairly be held that the execution proceedings in this case have been continuous, and that he is proceeding now, not upon a fresh application, but upon his former application.

For these reasons we think that this application was not barred and that the execution ought to be proceeded with. The decision of the Lower Court is reversed and the case remanded. Costs of this appeal to be costs in the execution proceedings.

[PRIVY COUNCIL JUDGMENT.]

The 14th January 1875.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

Hindoo Wife—Life Interest—Dowl.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Mohima Chunder Roy and another

versus

Durga Monee and another.

Where a Hindoo wife is entitled to an absolute estate in certain property, her husband cannot cut down her interest to a life-interest by any dowl which he may make.

THIS was a suit brought by the sons of Tillock Chunder Roy by one of his wives, against the daughter of his other wife, to recover possession of certain property which the daughter alleged that her mother, who died before the suit, was entitled to as an estate of inheritance in the nature of jowtook or streedhun, but which as the sons alleged belonged to her only for her life, and after her death reverted to them.

The plaint relies chiefly upon a certain dowl, which is described in these terms:—"Agreeably to the deed of specification of "shares of our father, Tillock Chunder Roy "Chowdhry, on the 18th Bysuck 1244 B.S., "and the list dated the 27th Joisto 1244, "signed by him, the six kâtas (plots) written "in the under-mentioned first schedule, and "the two kâtas (plots) of property written "in the second schedule, were, on account of "maintenance, held possession of by our "stepmother, Manoka Chowdranee, under "these conditions,—that she should in her "lifetime enjoy the proceeds of the said "property, without the power of making "over the same by sale or gift, and on her "death the said property would devolve on "the sons of our father." In the first schedule annexed to the plaint they described the six portions of the property which they had mentioned, and in the second the other two. Durga Monee, the defendant, in her written statement, says in answer, with respect to properties Nos. 1 to 6 inclusive, they belonged to her mother. No. 1, she says, was her mother's jowtook estate, and Nos. 2 to 6 property acquired by her mother from her streedhun estate. But with respect to Nos. 7 and 8, she says that they were assigned by her father to her mother under a

* From the judgment of Kemp and Glover, JJ., dated 7th July 1865.

Digitized by Google

writing of the 21st Joisto 1244, that is, a writing or list made by him on the 2nd of June 1837, shortly before his death. It is very material to distinguish between the titles which she sets up to these two sets of property, respectively, the first being a title of long standing in her mother, who obtained an estate of inheritance by conveyances of an early date, the second resting entirely upon this list of June 1837, a distinction which has not been adverted to by either of the Courts in India.

The plaintiffs' and defendants' cases may be thus respectively stated. The plaintiffs put no evidence whatever of any title or seisin on the part of their father; they put in no deeds, they gave no evidence of receipts of rent or profits, or any evidence customary in actions of this kind, but they put in this dowl, which bears date the 25th April 1837, some two months, or a little more it may be, before the death of their father, the purport of which is this,—that after making a partition of the great bulk of his property among his four sons, he proceeds to say:—"Besides this I "have two wives, Sree Manoka Chowdranee," —that is the mother of the defendant,—"and "Sree Raj Monee Chowdranee. The jageers "and other property of mine which they "hold in their possession shall be confirmed "to them during their lives in lieu of main- "tenance. They shall have no power of "making sale or hibba of the same. On "their deaths the sons will receive equal "shares thereof respectively. Moreover, "when the maintenance is insufficient, the "deficit will be made up in a reasonable "manner." They also put in a list of property stated to have been made by their father on the 8th of June 1837, about six weeks after, and very shortly before his death, which begins in this way:—"List of "the property assigned over as maintenance. "Creditor Manoka Chowdranee and debtor "Tillock Chunder Roy." Then follows a description of lands which are stated to have been previously given, a description which substantially agrees with the first schedule in the plaint, relating to lands Nos. 1 to 6 inclusive. These are described as previously given. Then this list gives this heading—"Given for making up the deficit," under which heading follows a description of property substantially corresponding with Nos. 7 and 8 in the plaint.

The plaintiffs have shown that in May 1837 a petition stating the execution of the dowl, and its material provisions was filed by or in the name of Tillock Chunder Roy in the Court of the Judge of Zillah Buhagunge, and that the dowl itself was filed shortly after the death of Tillock in a proceeding whereby his sons sought to substitute themselves for him as parties to a suit; they have also put in copies of two vakalutnamahs, executed, the one by the widow, the other by the sons of Tillock Chunder, in February 1839, from which it appears that the widow having set up some right of adoption, a compromise had been made. In her vakalutnamah she referred to a list made up and prepared by her husband; the other vakalutnamah referred to the dowl and also to their list. This in substance was the case of the plaintiffs.

The defendant put in several deeds, and gave the evidence of the attesting witnesses to them, for the purpose of showing that her mother had acquired several of the properties mentioned in the schedule to the plaint; that she had acquired the earliest of those properties as long ago as 1815, another in 1820, and others in 1831. With respect to three of these deeds she called the attesting witnesses. With respect to the fourth, she did not call any attesting witness; but it is to be observed that all of them were more than 30 years old. If these deeds were genuine, she showed that the interest in certain talooks was conveyed to her mother absolutely, subject to the payment of a quit-rent; and that these conveyances were confirmed by her father Tillock Chunder, who claimed a right as superior landlord to his wife, upon the payment to him of a certain quit-rent. She put in documentary evidence showing her mother's title to four out of the six properties mentioned in the schedule, and she gave some parol evidence, no doubt not of a very satisfactory character, that the others had been purchased out of her mother's jowtook.

The Principal Sudder Ameen decided in favor of the plaintiffs. He held that they had proved their dowl and the accompanying list. He held that the defendant had not proved her documents; on the contrary that they were forgeries; and he gave judgment for the plaintiffs. This judgment was reversed by the High Court. The High Court found that the dowl was a forgery. They do not expressly state, but perhaps it may be collected from what fell from them, that they did not agree with the view of the Principal Sudder Ameen that the documents put in by the defendants were false, but their Lordships have to regret that they have not the assistance of any distinct finding on the part of the High Court on this sub-

Digitized by Google

ject. The High Court treated the genuineness of the dowl as the sole question in the case. They reversed the judgment of the Court below, and gave judgment for the defendants. Their Lordships regret to have to observe that neither of these judgments appear to them satisfactory, and it will be necessary to state their view of the case. Their Lordships are by no means satisfied with the reasons given by the High Court for reversing the judgment of the Principal Sudder Ameen, to the effect that the dowl was genuine. On the whole their Lordships are inclined to think that the dowl and the document accompanying it—the list—were genuine documents. On the other hand, they are not prepared to dissent from what, as before observed, would appear to be the finding of the High Court that the deeds of the defendant were genuine. It would appear by the case of the plaintiffs themselves, that the defendant's mother had been in possession of these properties for a considerable time; that she had in one of them at least what is called a nim ousut talook, which would probably be created by some document or other; and it may be assumed that some documents relating to her title were in existence. She puts in documents; she proves them by the evidence of attesting witnesses—at all events three of them. The plaintiffs on the other side put in no title-deeds of their own, nor any kuboolents or counterparts such as might be expected to be in their possession of the title-deeds under which the defendant's mother held such of the properties as she admittedly held under her husband; and further it is to be observed that when summoned as witnesses for her by the defendant, they declined to put themselves into the box. On the whole their Lordships are of opinion that there is no sufficient ground for coming to the conclusion that these documents on the part of the defendant are forged.

That being so, it is necessary to consider what aspect the case presents. It appears to their Lordships that assuming the genuineness of these documents on the part of the defendant, it is made out she was entitled to an absolute estate in lots Nos. 1 to 6, both inclusive. They come to that conclusion, partly on the strength of her evidence, partly in the absence of any evidence whatever on the subject on the part of the plaintiffs. Then, if that were so, her husband could not cut down her interest to a life-interest by any dowl which he might make, and accordingly the dowl, assuming it to be genuine, appears to their Lordships to have been inoperative. Whether each or both of the lists are genuine, it does not appear to their Lordships absolutely necessary to decide. They are disposed to find as a fact that the list which came to the possession of the defendant is that which she now produces. It is possible that another list also may have been made, and that may have been, as the plaintiff Mohima states, entrusted to his possession. It is not necessary to go with great minuteness into an examination of these two documents, because it appears to their Lordships that, having come to the conclusion which they have already expressed, the materiality of the list produced by the defendant would appear to be that, with respect to Nos. 7 and 8, those properties were given to her for the purpose of supplementing her maintenance. Adopting her own view, that the reference in this list to those properties which she then held recognises her title to an estate of inheritance in them, it appears to their Lordships that the proper construction of the supplemental grant for the purpose of making her maintenance sufficient for her purpose is, that that grant should be for life and for life only. They think it highly improbable that that portion of the supplemental grant which consisted of a part of the dwelling-house of the family should have been intended to be granted to her in perpetuity. Their Lordships therefore have come to the conclusion that as far as lots from Nos. 1 to 6 are concerned, the plaintiffs have failed to make out their case, and that the defendant is entitled to judgment; but that as far as lots 7 and 8 are concerned, they have made out their case, and that the plaintiffs are entitled to judgment.

Their Lordships will therefore humbly advise Her Majesty to reverse the decree of the High Court, except so far as it reverses the decree of the Principal Sudder Ameen; and in lieu thereof to declare that the plaintiffs have failed to establish, as against the defendant, any title to the lots 1 to 6 in the plaint mentioned, and to decree that they do recover possession of the said lots 7 and 8 from the defendant, with the mesne profits received by her since the date of the institution of the suit, but that the said suit, so far as it seeks to recover the said other lots, do stand dismissed; and to direct that the costs in the Lower Courts be borne by the parties, respectively, according to the value of the property decreed and disallowed. Each party will bear their own costs of this appeal.

Digitized by Google

The 15th January 1875.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp, Louis S. Jackson, W. Markby, and W. Ainslie, *Judges.*

Specially Registered Bond—Act XX of 1866 *s.* 2 *—Res-judicata—Act VIII of* 1859 *s.* 2.

Case No. 207 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Backergunge, dated the 13*th November* 1873, *affirming a decision of the First Subordinate Judge of that district, dated the* 29*th September* 1872.

Syud Emam Momtazuddeen Mahomed (Defendant) *Appellant,*

versus

Raj Coomar Doss (Plaintiff) *Respondent.*

Baboo Kalee Mohun Doss for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

Case No. 222 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Backergunge, dated the 13*th November* 1873, *modifying a decision of the Sudder Moonsiff of that district, dated the* 28*th December* 1872.

Haran Chunder Ghose (one of the Defendants) *Appellant,*

versus

Dinobundhoo Bose (Plaintiff) *Respondent.*

Baboo Kalee Mohun Doss for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

A creditor who has resorted to the summary procedure provided by Act XX of 1866 s. 53 and has recovered a portion of his claim in execution of the decree so obtained, is not at liberty to bring a regular suit *against the same parties* for the enforcement of his remedies under the bond.

Of course there may be a right of suit remaining against *third persons* not parties to the first proceedings.

These cases were referred to the Full Bench on the 2*nd July* 1874, *by Jackson and McDonell, JJ., with the following remarks:—*

Jackson, J.—THESE two cases raise what appears to me a very serious question. Although the two cases differ a little in their features, there is one important question which is common to both, and that is, whether a creditor who has resorted to the summary procedure provided by Section 53 of Act XX of 1866, and has recovered a portion of his claim in execution of the decree so obtained, is afterwards at liberty to bring a regular suit for the enforcement of his remedies under the bond, merely giving the defendant credit for such amounts as he has already recovered. There is a case in XVII Weekly Reporter, page 154, in which a Division Bench of this Court held in effect that a plaintiff who had obtained such summary decree is not thereby debarred from bringing a further suit. Mr. Justice Kemp in his judgment no doubt says in one place:—"It appears to us clear that the plaintiff is "entitled to institute a regular suit which he "has done, to have the question tried whether "the property pledged in this bond is liable "for the debt covered by the bond." If that sentence were taken by itself, it might seem to indicate merely the opinion that the plaintiff having already got a summary decree for the money lent would be entitled to have the question tried whether he could not follow the property pledged in the hands of a third party. If that were all that was affirmed by that decision, I do not know I should be inclined to question it, always supposing that there is something remaining to execute in execution of the decree obtained against the judgment-debtor, but it really appears to me that the judgment of the learned Judge goes further, because he observes "substantially the prayer of the plaint is "to have the defendants, and more particularly "the Goopta defendant, declared liable, and "her property liable to sale for the liquidation "of the debt secured by the bond of the 9th "Jystee 1274, that is to say, to make the "property pledged liable for the debt." In that case it appears that certain proceedings had been taken under Section 55, the result of which was to release from liability a person who was called the Goopta defendant. Further on, the learned Judge observes:—"As against the defendant Ooma Kant "Mojoomdar against whom the plaintiffs "have obtained a money decree, there can "be no doubt that they are entitled to "bring a suit to follow and make the property "pledged liable for the debt; and as against "the other defendant, the female defendant "Chittro Rekha Goopta, although under "Section 55 of Act XX of 1866, she has under "special circumstances, been declared entitled "to have the summary decree against her

Digitized by Google

"set aside and execution stayed; and although "there is no appeal against such an order, "there is nothing in the law to prevent the "plaintiffs from bringing a regular suit to "establish the fact that the Goopta defendant "and her property are liable under the bond. "In this view of the case, we think that the "Subordinate Judge was wrong in refusing "to try this case." It seems to me, therefore, that the Division Bench intended to lay down that as against all the defendants, there was a good cause of action upon which the plaintiff was entitled to sue.

Now, it appears to me, as at present advised, that the plaintiff finds himself here on the horns of a dilemma. Either he has brought his suit under the summary procedure prescribed by Section 53 upon the bond, and has obtained a decree such a decree as the Court to which he resorted was able to give him, and in that case the rule of *res-judicata* will apply, which rule the Judicial Committee of the Privy Council have repeatedly declared to extend much farther than the limited terms of Section 2 of Act VIII of 1859; or else having to prove under that bond his right to certain relief including interest down to the period of the suit and to the period of realization, together with a lien upon the immoveable property pledged in the bond, he has brought his suit only for a part of that which he was entitled to under the bond, and is, therefore, by the operation of Section 7 of the Procedure Code, debarred from bringing a further suit in respect of the same matter. It appears to me that this view is not affected by the circumstance that part of the relief to which he was entitled is beyond the power of the Court to which he first went. The plaintiff had his choice of the Courts and it was open to him to go to the Court which would give him the larger relief. He elected not to do so and went to the Court of limited jurisdiction. I am inclined as at present advised to hold that a plaintiff is not entitled after having obtained a decree under Section 53 of the late Registration Act to bring a fresh claim in respect of the same subject-matter in a regular suit. I do not wish to express any final opinion in the matter, but as the point is one of considerable importance and is likely to arise again, I think it ought to be referred for an authoritative decision to a Full Bench.

McDonell, J.—I concur in thinking that the point should be referred to a Full Bench.

Baboo Kalee Mohun Doss for the (defendant) appellant, contended before the Full Bench that the second suit which the (plaintiff) respondent brought, ought to have been dismissed, inasmuch as it was in respect of the same cause of action as the first suit for which a decree had already been obtained by the plaintiff.

The 2nd Clause of Act VIII of 1859 is in these terms:—"The Civil Courts shall "not take cognizance of any suit brought "on a cause of action which shall have "been heard and determined by a Court of "competent jurisdiction in a former suit "between the same parties or between "parties under whom they claim."

Under the agreement, the plaintiff in this case had two modes of procedure before him; the one summary, the other more dilatory. He chose the former, i.e., he proceeded under Section 53 of Act XX of 1866 for the enforcement of his agreement. His petition being properly presented, the Court made a decree in his favor against the defendant. But the plaintiff finding that by this decree he could only obtain part satisfaction of the sum due to him, now brings another suit against the defendant for the same cause of action to recover the whole sum. But it is clear the plaintiff cannot by the 2nd Clause of the Code of Civil Procedure bring a second suit on a cause of action which has already been heard and determined by a Court in a former suit between the same parties. What the plaintiff asks now in this suit, he ought to have asked when he brought the first suit. A defendant cannot be vexed twice in the same cause. In the case of Soorjomonee Dayee *v.* Suddanund Mohapatter, 20 W. R., p. 377, the Court "said:—It has probably never been better "laid down than in a case which was referred "to in the 3rd volume of Atkyns, Gregory *v.* "Molesworth, in which Lord Hardwicke held "that where a question was necessarily "decided in effect, though not in express "terms, between parties to the suit, they "could not raise the same question as "between themselves in any other suit in "any other form; and that decision has been "followed by a long course of decisions, the "greater part of which will be found noticed "in the very able notes of Mr. Smith to the "case of the Duchess of Kingston."

The case referred to by Mr. Justice Jackson and which was decided by Mr. Justice Kemp, is a case distinguishable from the present one. That was a case to further the execution of a decree already obtained, but what the plaintiff seeks in this case is for the Court to make a fresh decree, which clearly cannot be done, inasmuch as the Court has already made a

Digitized by Google

decree against the defendant in the same cause of action. Two decrees can never be made against a person for one and the same debt.

Baboo Mohinee Mohun Roy, for the (plaintiff) respondent, contended that the second suit of the plaintiff would lie, inasmuch as the relief sought by this suit was not identical in its nature to the former suit; moreover the parties were not all the same. In the former suit there was only one plaintiff; in the second suit there were two, and the relief sought for was far more extensive than what was asked for in the former suit.

Again, a second suit can only be barred by some principle contained in some Legislative Act. Sections 52 and 53 of Act XX of 1866 show the nature of the relief that can be obtained under that Act. Now, in order that a *res-judicata* be made out, it must be shown that the decree which the Court has given is in regard to the same matters, as well as the same in kind as a decree given under the Code of Civil Procedure. Under Sections 305, 306, and 307, respectively of the Code, a suit cannot be decided unless a day be fixed for the hearing of the case, unless evidence be taken, and unless notice to the opposite party to defend be given. But the procedure under Section 53 of Act XX of 1866 is vastly different. There being no trial, the question necessarily arises as to whether such a proceeding can be regarded as a suit. It clearly cannot, inasmuch as the materials required to make it a suit under the Civil Procedure Code are wanting. This summary procedure may resemble a suit. There may be points of analogy to a suit, but, in fact, it is not such a suit as is regarded by Courts of law or by the Legislature. Furthermore, the Court under Act XX of 1866 is a Court of limited jurisdiction. Under the circumstances, therefore, the 2nd Clause of Act VIII of 1859 is not applicable to the present case, and the second suit therefore is not barred, as there is no *res-judicata*. In the case of Lalla Teeluckdharee Lall *v.* The Court of Wards 11 W. R., p. 149, Mr. Justice Jackson said:—"There have been "several cases before several Division "Benches of this Court, in which opinions "have been delivered by different Judges of "the Court, to the effect that a person who "sues upon a bond containing a lien, only to "obtain a money decree in the first instance, "can afterwards bring a suit to enforce his "lien. I concur in those opinions; and "following them, the contention of the re-"spondent's vakeel in this case must, in my "opinion, fail." *Vide* also 15 W. R., p. 486. In the case of Sreedhur Jha *v.* Dabee Dutt Chowdhry and others, 9 W. R., p. 170, the Court held that "when questions are not "before a Court judicially, its decision in "regard to them is a nullity. A suit to "assess land and recover rents at an enhanced "rate must be dismissed, if not brought "under some Section of Act X of 1859." *Vide* also 17 W. R, p. 154; 9 W. R., p. 170; and 4 W. R., p. 50.

Baboo Kalee Mohun Doss, in reply, said that the cases cited by Baboo Mohinee Mohun Roy do not bear upon the present question. The case in the 11th W. R. is a case in which a third person was the defendant, and in the case in the 15th W. R., the mortgaged property passed to the hands of third parties totally different persons: likewise in the case in the 9th W. R., the suit was brought against a *third* party who was the mortgagee.

The judgments of the Full Bench were delivered as follows:—

Couch, C.J. (Kemp and Ainslie, J.J., concurring.)—The question referred to the Full Bench is "whether a creditor who has "resorted to the summary procedure provided "by Section 53 Act XX of 1866, and has "recovered a portion of his claim in execution "of the decree so obtained, is afterwards at "liberty to bring a regular suit for the enforce-"ment of his remedies under the bond, "merely giving the defendant credit for such "amounts as he has already recovered."

The referring order points out that this question may have to be considered with reference to both Sections 2 and 7 Act VIII of 1859, but for the present it will be convenient to treat it as only involving the question under the first of these Sections, and the first matter for consideration is whether proceedings under Section 53 of the Registration Act of 1866 are to be deemed a suit.

The petition of the person seeking to recover on a specially registered bond duly verified in the manner required by law for the verification of plaints is to be filed in the Court which would have jurisdiction to try a regular suit on the obligation, and that Court is to make a decree which is to be enforced under the provisions for the enforcement of decrees contained in the Code of Civil Procedure.

The difference between this proceeding and an ordinary suit in which judgment is confessed is that in the first, the confession, instead of being directly notified to the Court after a suit has been commenced, is recorded

Digitized by Google

by an officer specially empowered by law to record it in anticipation of any proceedings in Court, and that the Court is specially empowered to act on such confession as soon as it is laid before it.

Special registration was first introduced by Act XVI of 1864. The language of Section 52 of that Act differs materially from the language of the later Act, and it may be doubted whether a proceeding under Section 52 Act XVI of 1864 could be held to be a suit.

Under that Section the obligation was to be enforced "without a suit," and there was no provision for making a formal decree; the *obligation* was to be enforced "as a decree in a suit," but subject to any provisions contained in any law for the time being in force in relation to the enforcement *without a suit* of bonds or other obligation for the payment of money registered under Section 51.

The change of expression must be taken to have been adopted advisedly, and that change supports the opinion that proceedings under Section 53 of Act XX of 1866 are in the nature of a suit. The fact that only certain portions of the Code of Procedure apply to proceedings under the Registration Act (X Weekly Reporter, 84) is not material, for the substitution of a special procedure up to decree for the ordinary procedure prescribed in the Code does not alter the nature of the transaction, which is, as in all ordinary suits, a prayer to a competent Court by a person having a claim against another to enforce that claim by the exercise of the authority of the Court. The claim to the money secured by the bond and the following up of that claim by application to a Court is a suit of a civil nature within the meaning of Section 1 of the Civil Procedure Code independently of any peculiarities in the mode of prosecuting it.

In considering the nature of proceedings under Section 53 Act XX of 1866, we must look at the nature of the remedy obtainable thereunder, and for this purpose it is necessary to examine the effect of decrees for realization of debts made in ordinary suits. A decree under Section 53 is at least equivalent to a money decree in an ordinary suit, and on examination it seems to us that there is no substantial difference between the effect of an ordinary money decree on a mortgage bond and a decree on the same bond for recovery of the money due by sale of the mortgaged property. So that, whether a decree for the money be made under Section 53 or in a regular suit, the remedy of the mortgagee is the same. When a creditor under a bond, by which property is mortgaged, takes a money decree and proceeds to attach and sell the mortgaged property, he thereby transfers to the purchaser the benefit of his own lien and the right of redemption of his debtor, and if there be no third party interested in the property it becomes vested absolutely in the purchaser.

If the sale be under a decree for sale it can do no more than this. There is, we think, no warrant for holding that when a sale is under a decree for sale it conveys the rights of both creditor and debtor, but that when it is in execution of a simple money decree only the rights of the debtor pass and the creditor retains his lien. The object of a sale of mortgaged property in execution of a decree is not to transfer the debt from the debtor to the purchaser of the mortgaged property, but to obtain satisfaction out of the security. Thus, whether the decree do or do not direct the sale of the mortgaged property, the mortgagee, when he puts that property up for sale, sells the entire interest that he and the mortgagor could jointly sell.

It cannot be rightly contended that the mere taking of a money decree extinguishes the creditor's lien. There is a case reported in XII Weekly Reporter, 522, which seems to go to this length. See the passage in page 523 beginning:—"Now it appears to us," but these words are qualified by a passage further on "we do not see, &c.," and the case in XI Weekly Reporter, 481, is directly the other way. If, then, the lien be not extinguished by taking a money decree, and if it continue an incident of the debt when it passes from a contract debt into a judgment debt (see XIX Weekly Reporter, page 259, in the case of Syud Nadir Hossein commencing at page 255) as the creditor cannot sell the property and retain the lien, it must continue in existence so far as may be necessary for the protection of the purchaser. An order for sale cannot conclude persons not parties to the suit, and without such order in the absence of any third party interested in the property, a complete title passes by the sale in execution of the money decree.

If there be persons not parties to the suit claiming an interest in the property, form of dealing with the property in their absence can prejudice their rights. The decision of the Full Bench in I Weekly Reporter, page 315, is clear on this point. It seems to us that that decision does no more than declare this as a fundamental rule. The expression "he is simply in the position of

Digitized by Google

an ordinary judgment-creditor in respect of his decree, and can only sell the rights and interests of his debtor" could not be intended to limit the decree-holder's power of selling the rights conferred by his lien.

Reading these words with the context, they seem to us only to import that the subsequent incumbrancer cannot be concluded by any order made otherwise than in a suit to which he is a party, but as to whether this is to be brought by the first creditor or his assignee under the execution sale there is nothing said. The judgment only deals with the case of a creditor himself seeking to enforce his lien, and who has not assigned it to another by a sale in execution.

The fact that property is mortgaged to one is no bar to a mortgage or sale of the equity or right of redemption to another.

The remedy of the mortgagee under a mere money decree and under a decree for sale being identical so far as the parties to the suit are concerned, he cannot have a right to a second suit against the same parties to enforce what he has already obtained. Of course there may be a right of suit remaining against third persons not parties to the first proceedings, but that in no way affects the question before us. The fact that a creditor taking a money decree has already obtained as complete a remedy against the persons sued as he can have *against them* appears to us very strong ground for holding that proceedings under Section 53 of the Registration Act are as much suits as any other proceedings to which Section 1 and the rest of Act VIII of 1859 apply.

Inasmuch as the creditor who takes a specially registered mortgaged bond may be said to have stipulated not only for a summary decree, but also for a right to have specific property sold for satisfaction of his debt, if by a decree made under Section 53 of the Registration Act he could not get the full benefit of his contract, it might be doubted whether it would be a reasonable construction of the 2nd Section of the Procedure Code to hold that he has exhausted his remedy by a proceeding under the first named Section, but inasmuch as he does get the full benefit thereof as against the contracting parties, and there is nothing in the fact of his having taken a decree against them under that Section to restrain him from proceeding against third persons by a separate suit, there seems to be no ground for holding that the provisions of Section 2 Act VIII of 1859 do not apply where the first suit is in the form of a proceeding under Section 53 of the Registration Act.

In this view of the case, it is unnecessary to consider the question under Section 7 raised by the referring order.

Jackson, J.—Sudashib Doss (whom the plaintiff in the suit represents) lent the defendant Rs. 2,000 on a bond, whereby the defendant undertook to repay the principal with interest at Rs. 1-8 per cent. per month in Chyet 1273, and as collateral security pledged certain immoveable property.

The bond was also specially registered, and Sudashib, after due date, applied to the Court having jurisdiction under the provisions of Section 53 Act XX of 1866. The Court thereupon gave him a decree, and under that decree it seems that Rs. 800 were realized in execution.

After Sudashib's death the plaintiff got back the bond on the ground, it is said, that by the decree which Sudashib had obtained, no interest for a time subsequent to the decree could be recovered, nor could he avail himself of the pledge of land, and he brought the present suit to recover the principal sum with interest to the date of suit, allowing credit for the sums already realized, but with deduction of the costs of the first suit. The defendant urged many pleas, the chief of which were that there could be no second suit on the same cause of action; that as to the land there was no cause of action at all; that if any suit lay it would not be in this form; that the whole claim was now barred by limitation.

The Subordinate Judge threw out these objections, and relying very much on the decision in XVII Weekly Reporter, p. 154, held that the suit would lie.

He accordingly gave judgment for the amount claimed, except that he disallowed the costs of the previous suit or application.

On appeal this judgment was confirmed by the District Judge who referred for the reasons of his decision to a judgment which he had delivered on the same day in a different appeal which is set out at page 10 of the paper book.

That case, however, differed in some respects from the present, for it there appeared that plaintiff had been unable to realize more than one rupee of the sum decreed, and that the land in pledge had in the meantime changed hands. It does not distinctly appear from the judgments of the Lower Courts that the plaintiff sought to recover more than had been already adjudged, but he asked for a declaration against the land.

Digitized by Google

The Moonsiff in that case refused a decree for the debt, but gave the required declaration as to the mortgage lien. This, on appeal, the Judge extended by giving a fresh decree for the money.

It will be convenient to deal in the first instance with the suit before the Subordinate Judge. That was on a bond containing an obligation to pay money and a simple mortgage. The nature of the suit to be brought on such an instrument is described in Macpherson on Mortgages (5th Edition), page 10, and if the plaintiff succeeds in such a suit, he obtains a decree for the money with a declaration that he is entitled to have it satisfied by the sale of the land. Such a decree could not be had in a Court of Small Causes, nor could it be made under the 53rd Section of the Registration Act.

But the lender had thought fit to protect himself still further by the form of special registration, and as it appears to be optional in the case of such bonds to proceed under Section 53 or by suit in the ordinary way, he had thus, as it seems to me, secured to him the choice of two remedies or modes of obtaining relief, either the common suit by which he could obtain complete relief including the enforcement of his mortgage lien, but subject to the necessity of proving his case and to the incidents of appeal and the various delays of regular litigation, or the rapid procedure of Section 53 precluding appeal or even defence, but limited as to the relief afforded. He chose the latter and obtained a decree which completely exhausted his cause of action in so far as that arose out of the non-payment of the money and his right to recover it. And the contract debt had thus, as it seems to me, merged or passed *in rem judicatum*, so that no further suit for the same debt could be maintained, and both on general principles and by the terms of Section 2 the matter was concluded. I have no doubt that for the purposes of this discussion the proceeding under Section 53 was a suit, brought in a particular form and regulated by a particular procedure. And the difference between the plaintiff's position with such a decree, and what it would have been at the conclusion of a regular suit, is this that he would have over and above the judgment for his money, a right created by the deed, but undeclared by the decree, to enforce that judgment by sale of the property mortgaged.

It is not necessary here to state precisely how the difference would affect the decree-holder: it is enough to say that he would be in a distinctly less favorable position as regards third parties.

If the land continued in the hands of the debtor, it would probably make no difference at all, for he could always attach the land in execution, and the 11th Section of Act XXIII of 1861 would prove abundantly efficacious for the decision of any question which might arise between debtor and creditor.

As regards third parties, if the land had been intermediately alienated, it seems to me that the creditor would have a good cause of action against his borrower and the purchasers from that person, upon the separate contract to hold the land at his disposal for the satisfaction of his claim.

For these reasons I conceive that the decision of the Subordinate Judge and of the District Judge are both erroneous and ought to be reversed.

In the case before the Moonsiff which is the subject of the second special appeal (No. 222), the plaintiff sought a fresh decree for the unsatisfied portion of his claim as well as a declaration of his lien as against the alienee.

Upon the considerations already stated, I am of opinion that the Moonsiff, who granted only the latter prayer, was right, and that the Judge who altered his decree was wrong.

Markby, J.—I concur in thinking that the proceeding under Section 53 of Act XX of 1866 is a *suit* which terminates in a *decree*.

But it is said that inasmuch as the creditor stipulated not only for a decree but for a right to sell specific property in satisfaction of his debt, it might not be a reasonable construction of the statute to hold that he has exhausted his remedy by a proceeding under Act XX Section 53, if under the decree so obtained he cannot get the same right to sell the property as he could obtain in a regular suit.

I have had some doubt whether this argument sufficiently disposes of the question, what is the cause of action in the proceeding under Act XX Section 53, and wherein does it differ from the cause of action in the suit now before us? But assuming that the difference in the remedy would take the case out of the rule of *res-judicata*, still the question arises could the plaintiff get any remedy in the regular suit which he could not have got on his decree in the summary suit under Act XX Section 53?

The plaintiff's rights as decree-holder under Section 53 Act XX are those of a bond-holder with security who has obtained a simple decree for his debt, or as it is generally called a money decree. All he could get in

Digitized by Google

the regular suit is a decree against the very same person, namely, his debtor, with the additional declaration, which is now very often inserted in the decree, that the property comprised in the bond is to be sold in satisfaction of the debt. The question then is, whether there is any difference between these two decrees.

The course of procedure in both cases after decree is precisely the same. The property must be attached and sold by the ordinary process of law in execution of the decree.

The thing sold will be the same. A notion has (it is true) been started that only what is (as I consider inaccurately) called the debtor's equity of redemption is sold under a money decree, that is to say, that the property will be sold subject to the bond-holder's lien. But it is agreed that that is not so, and that the purchaser takes all that the creditor as well as the debtor is able to convey. I may mention that the case reported in VIII Weekly Reporter, 291, which is some times relied on as a decision to the contrary has been reviewed, and an entirely different conclusion arrived at by Loch and Mitter, JJ., who heard the case after the review was admitted.

As regards third persons not parties either to this or the former suit, the result is the same whether the property be sold under a money decree or under a decree declaring the lien. Their rights are not affected more or less in the one case than in the other. As against third parties the declaration of the lien contained in the decree can have no operation whatsoever; *they* can only be affected by a declaration in a decree in a suit to which they have been made parties. If the rights of claimants to the property subsequent to the security bond are in any way affected, it cannot be by reason of the declaration made in a suit to which they are no parties; it can only be by reason of the sale. Whether the rights of third parties are in any way affected by the sale or not, is not a matter which, as it appears to me, we are called upon to decide in the present case. There are decisions upon this point in VII Weekly Reporter, 233, and I Bengal Law Reports, App. Civil, 154,* and I should desire further consideration before holding that in no case the rights of third persons created subsequent to the security are in any way affected by a sale under the security bond, that is to say, so far as it can be said to affect their rights that the whole property pledged should be turned into money at the instance of the first pledgee. As a general principle of law, I should be inclined to say that the right to sell the very thing pledged is inherent to the pledgee, and as a general rule I should also say that no claimants upon the property posterior to the first pledgee can interfere with this right, though, of course, they may have a right to redeem before sale; and they may have a very effectual claim on the surplus proceeds, if there are any left after satisfying the first pledgee. In England the law has been somewhat slower than elsewhere in giving to the pledgee a right of sale, but neither in the English law nor in any other law, as far as I am aware, has there been any doubt that, if the pledgee can sell at all, what he sells is the property pledged: and it appears to me to be very doubtful whether it would not be undesirable both for pledger and pledgee that there should be a sale of anything else, because I think such a sale as seems to me to be suggested by three of my learned brethren might lead to the property being sold at a very inadequate price; as it will be uncertain whether the purchaser is buying the property itself or a mere right to hold it subject to some claim of third parties.

All, therefore, that I wish to say in this case is, that a money decree against the debtor himself is neither better nor worse than a decree against the debtor himself which declares the lien. If, in order to get the full benefit of his pledge, the bond-holder has to sue third parties, there is nothing to prevent his doing so.

* 10 W. R., Civil, 151.

The 7th January 1875.

Present:

The Hon'ble F. B. Kemp and E. G Birch, *Judges.*

Suit for Foreclosure—Sale of Mortgaged Property.

Case No. 351 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 20th July 1874.

Lalla Rooder Pershad and another (Objectors) *Appellants,*

versus

Hur Pershad Doss and others (Decree-holders) *Respondents.*

Baboos Mohesh Chunder Chowdhry and *Chunder Madhub Ghose* for Appellants.

Bboo Kalee Kishen Sen for Respondents.

Digitized by Google

A decision of the Principal Sudder Ameen, which declared the decree-holders entitled to satisfy their decree by the sale of certain hypothecated properties, having been reversed by the High Court, an appeal was preferred to the Privy Council, which reversed the decree of the High Court and affirmed the original decision, and provided for the payment of costs:

HELD, that the lien established by the Privy Council decree was not lost to the decree-holders by their previous conduct in receiving a portion of the decretal money by the sale of part of the mortgaged premises, which money was subsequently returned by them to the judgment-debtor, on the decision of the Principal Sudder Ameen having been reversed by the High Court.

Kemp, J.—LALLA Rooder Pershad and another, the objectors in the Court below, are the appellants in this Court. The argument in this case has occupied a considerable portion of our time, but the points necessary to refer to in this appeal are not many. The present application of the decree-holder is to execute three decrees: one, of the Principal Sudder Ameen, dated the 24th of September 1862; one, of this Court, dated the 9th of January 1864; and one, of the Privy Council, dated the 25th of June 1872, against three persons,—namely, Hunooman Pershad Sahoo, Nuboo Singh, and Umbika Tewaree. Hunooman Pershad was the original judgment-debtor in the case. The decree of the High Court is only for costs. The High Court reversed the decree of the Principal Sudder Ameen, and the decision of the High Court having been on appeal reversed by the Privy Council, the decree-holder obtained the costs of this Court, and the application is to execute the three decrees. Certain properties,—namely, the two Mouzahs Goondree and Russowlee,—were, it is alleged, hypothecated; and Nuboo and Umbika were admitted to carry on the case before the Privy Council. The Privy Council, in their decision, affirm the decision of the Principal Sudder Ameen, which decision declared that the decree-holders are entitled to satisfy their decree by the sale of the properties. The Privy Council decree further provides for the payment of the costs incurred by the appellants as follows,—namely, to be paid by Nuboo and Umbika Tewaree, 264*l.* 9*s.* 10*d.*, and to be paid by Hunooman Singh, who did not contest the case before the Privy Council, 19*l.* 1*s.*; and on this principle the present execution is taken out. Certain properties were advertised for sale by the decree-holders, and the objectors intervened claiming these properties under a purchase of 1872, and they say that they purchased these properties in execution of a decree declaring that the properties pledged might be sold in satisfaction of that decree. The Judge has rejected their objections, and directed the sale to proceed. The Judge's decision commences by referring to a former proceeding held by him on the 19th July 1863, in which he declares that the lien which the decree-holders had obtained has been lost to them by their own conduct in receiving a portion of the decretal money by the sale of a portion of the mortgaged premises,—namely, Mouzah Goondree. That is the first ground of his present decision; and the second ground is that, inasmuch as the objectors are identical with the judgment-debtors Nuboo and Umbika Tewaree, the decree-holder is therefore entitled to sell the property in satisfaction of his decree. The pleader for the respondents, decree-holders, has urged that the decision of the Judge in so far as it declares that his clients have lost their lien cannot stand, and it also appears from what has been stated to us by the pleader for the appellants that there is a regular suit at present pending between the decree-holders and the objectors with reference to the question of title in the subject-matter of this suit.

We think that the Judge is clearly wrong in saying that the lien established by the Privy Council decision has been in any way lost by the decree-holders' receiving a portion of the amount decreed by the sale of Mouzah Goondree, which money was subsequently returned by them to the judgment-debtor on the decision of the Principal Sudder Ameen being reversed by this Court. Then with reference to the decision of the Judge on the second point, we hold that he is clearly wrong in finding that the objectors were identical with Nuboo and Umbika Tewaree, the judgment-debtors, on no evidence with the exception of a copy of a petition which is referred to by the Judge, but which has not in any way been presented by the objectors.

The Judge's order must, therefore, be reversed and the appeal decreed with costs. Pleader's fees five gold mohurs.

Digitized by Google

The 7th January 1875.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Execution—Notice—Act VIII of 1859 *s.* 216—*Limitation—Act IX of* 1871, *Sch. II, Art.* 167.

Case No. 373 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Tirhoot, dated the 9th June 1874, *reversing a decision of the Subordinate Judge of that district, dated the 6th December* 1873.

Sheo Sahoy Singh (Decree-holder) *Appellant,*

versus

Birj Beharee Singh (Judgment-debtor) *Respondent.*

Moonshee Abdool Baree for Appellant.

No one for Respondent.

After partial satisfaction of a decree, the execution proceedings were struck off within three years from a date (13th March 1869) on which the decree was admittedly alive. The judgment-creditor subsequently applied for the issue of a notice, which was duly served on the 20th February 1871:

HELD that the notice was the only proceeding which the decree-holder could take, inasmuch as more than one year had elapsed from the date of the decree.

HELD (following a ruling in 22 W. R., 484), that such notice constituted a starting point for the commencement of a new period of limitation under Act IX of 1871, Sch. II, Art. 167.

Kemp, J. — No body appears for the respondent in this case. The decree was passed on the 21st of November 1867. The Judge himself admits that it was alive on the 13th March 1869. Moneys were recovered under it, and the case was struck off on the 18th of January 1871, or within three years from the 13th of March 1869. The judgment-creditor subsequently applied for the issue of a notice, and this notice was duly served on the 20th February 1871. The present application was made on the 14th of July 1873, and it therefore appears to us to be within time. The Judge has held that the application made by the decree-holder for service of notice was a colorable proceeding. It is the only proceeding which, under the law the decree-holder could take, inasmuch as more than one year had elapsed from the date of the decree, and we fail to see how the proceeding is in any way colorable. There is a case to be found in Volume XXII, Weekly Reporter, 484, in which it has been held that a notice issued within time under Section 216 Act VIII of 1859, and actually served upon the judgment-debtor, constitutes a starting point for the commencement of a new period of limitation under Act IX of 1871, Schedule II, Article 167. We reverse the decision of the Judge and decree this appeal with costs. Pleader's fees two gold mohurs.

The 7th January 1875.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Decree—Execution—Sale of Mortgaged Property.

Debee Doss, *Petitioner,*

versus

Lullit Mohun Shah Chowdhry and another, *Opposite Party.*

Baboo Mohinee Mohun Roy for Petitioner.

Baboo Sreenath Doss for Opposite Party.

Where a decree, which has been passed on a mortgage-bond, is to the effect that the decree-holder is entitled to have his lien satisfied by the sale of the rights and interests of the judgment-debtor in all the properties hypothecated, the High Court cannot modify its terms and direct the Court which is charged with the execution to sell first the judgment-debtor's rights and interests in one portion of the properties pledged, and then, if the proceeds are not sufficient, to proceed against the remaining portion.

Kemp, J.—DEBEE DOSS Baboo, who is the petitioner in this case, obtained a decree against Bykunt Nath Sandyal on the 19th of February 1872 on a mortgage-bond, in which the rights and interests of Bykunt Nath Sandyal in a putnee and other properties were hypothecated. On the 6th of July 1874 on execution of the decree being taken out, the putnee and other properties were lotted for sale. It appears also that the rights and interests of the judgment-debtors in the putnee property had been sold in execution of a money-decree, and Lullit Mohun Shah Chowdhry and others, the opposite party in this Court, purchased those rights and interests; and the Subordinate Judge, on the petitioner before us applying to execute his decree on the terms of that decree,—namely, that the properties hypothecated be brought to sale in satisfaction of that decree, has passed an order to the effect that inasmuch as

Digitized by Google

the rights and interests of the judgment-debtor in the putnee have been sold and purchased by Lullit Mohun Shah Chowdhry and others, this property cannot be sold again.

The opposite party's pleader admitted that this order cannot stand, but stated that there are peculiar circumstances in this case,—namely, that the putnee was not the only property mortgaged; that there were six or seven other properties mortgaged to the petitioner, and that in execution of their decree his clients had purchased not the rights and interests of Bykunt Nath Sandyal alone, but the rights and interests of the whole of the Sandyal family in this putnee; and that there was no notice of the petitioner's lien at the time of the sale; that as the putnee only was sold to them, and there are other properties pledged to the petitioner, it would be equitable for this Court to direct the Subordinate Judge to sell first the rights and interest of Bykunt Nath Sandyal in the properties other than the putnee, and if the proceeds of the sale of those properties are not sufficient to satisfy the decree of the petitioner, then to proceed against the putnee. We think that this cannot be done, as we cannot modify the terms of the original decree which is to the effect that the petitioner is entitled to have his lien satisfied by the sale of the rights and interests of the judgment-debtor Bykunt Nath Sandyal in all the properties hypothecated.

We, therefore, quash the order of the Subordinate Judge, and direct him to proceed upon the terms of the decree.

The rule is made absolute with costs. Pleader's fees two gold mohurs.

The 7th January 1875.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Decree on Mortgage-Bond—Money-Decree—Execution—Lien.

Debee Doss, *Petitioner,*

versus

Grish Chunder Bagchee and others, *Opposite Party.*

Baboo Sreenath Doss for Petitioner.

No one for Opposite Party.

A decree having been obtained on a mortgage-bond directing certain properties pledged to be sold, execution was taken out. Before satisfaction could be obtained another decree-holder took out execution of a money-decree against the same judgment-debtors, and a sale was ordered; but before the property was sold, application was made to the Court to have the first decree-holder's lien notified at the time of the sale. This was done, and the sale took place. The first decree-holder's representative then sued out execution as against the mortgaged property which had been hypothecated:

HELD, that there was nothing to prevent this execution, as all that the auction-purchasers had purchased was the rights and interests of the judgment-debtors subject to the aforesaid lien.

Kemp, J.—A RULE was issued in this case, but no body appears to show cause. It appears that Jadub Chunder Bagchee obtained a decree against Koylash Sunkur Sandyal and Kalee Sunkur Sandyal. That decree was on a bond, and certain properties,—that is to say, the rights and interests of the judgment-debtor in pergunnah Lushkurpore,—were hypothecated in that bond. Jadub Chunder Bagchee obtained his decree on the 28th of April 1873, and it directed the properties pledged to be sold in satisfaction of the decree. Execution appears to have been taken out in 1873 under No. 86. Before the decree was satisfied, however, the original decree-holder, Jadub Chunder Bagchee, sold his rights and interests in the decree to the petitioner before us, Debee Doss. In the meantime, before satisfaction could be obtained, another decree-holder, Jugudissur Talapatro, who had obtained a money-decree against the same judgment-debtors Koylash Sunkur Sandyal and Kalee Sunkur Sandyal, took out execution of that decree, and a sale was ordered to take place; but before the sale, Debee Dass, the purchaser of the rights and interests of the decree-holder Jadub Chunder Bagchee, applied to the Court to have his lien notified at the time of the sale. This was done, and the sale took place on the 13th of July 1874, and Grish Chunder Bagchee and Jadub Chunder Bagchee purchased the property. Debee Doss now sues out execution of the decree which he has purchased as against the mortgaged property which was hypothecated. Grish Chunder and Jadub Chunder appear, and object on the ground that the rights and interest of the judgment-debtors in pergunnah Lushkurpore having already been sold and purchased by them, they cannot be sold again. The Subordinate Judge, without giving any reasons whatever for his decision, has held that because the rights and interest of Koylash Sunkur Sandyal and Kalee Sunkur Sandyal, judgment-debtors, have been sold and purchased by the objectors he cannot permit the petitioner to execute his decree. As already observed, we issued notice on the opposite

Digitized by Google

party to show cause why this order should not be set aside, and no cause has been shown.

We think the order of the Subordinate Judge is clearly wrong. The decree purchased by the petitioner directs that the properties pledged be sold in satisfaction of that decree, and all that Grish Chunder and Jadub Chunder Bagchee have purchased is the rights and interest of the judgment-debtors subject to that lien. There is nothing, therefore, to prevent the petitioner before us, Debee Doss, from executing his decree as against the properties pledged. We quash the order of the Subordinate Judge, and direct him to proceed on the application of Debee Doss to execute the decree according to its terms.

The rule is made absolute with costs. Pleader's fees two gold mohurs.

The 20th January 1875.

Present:

The Hon'ble W. Ainslie and Romesh Chunder Mitter, *Judges.*

Rules as to Salt Department—Reg. I of 1824 *ss.* 9 *&* 14—*Khalary & Fuel Lands—Rights of Government.*

Case No. 239 of 1873.

Regular Appeal from a decision passed by the Judge of Midnapore, dated the 8th August 1873.

Rajah Gujendro Narain Roy (Plaintiff) *Appellant,*

versus

The Collector of Midnapore on behalf of Government and others (Defendants) *Respondents.*

Baboos Mohesh Chunder Chowdhry and *Doorga Ram Bose* for Appellant.

Mr. R. T. Allan and *Baboos Unnoda Pershad Banerjee* and *Bhyrub Chunder Banerjee* for Respondents.

HELD that the rules relating to the Salt Department in Reg. I of 1824, ought not to be construed so as to restrict their operation to the four districts named; but were intended to be enforced wheresoever lands might be held or required by Government for the manufacture of salt.

By s. 9, cl. 11, the lands worked by the Salt Department from the time of the assumption of the monopoly, or otherwise assumed and held before and since the perpetual settlement, although originally part of an estate for which a permanent settlement had since been made, were to be taken as held by the Salt Department under the owner of the estate as occupants in perpetuity not liable to pay rent. Accordingly in such cases the assets, whatever they might be, should not belong to the owner but to Government, and the proprietors of permanently estates cannot, at any time, maintain a claim against Government for anything done by it with these lands.

In regard, however, to fuel lands, to which the rules in s. 14 relate, there appears to be no right whatever in the Government to take them on the same terms as lands taken for the purposes of salt manufacture under s. 9. If there is no special engagement, the zemindar is never ousted from possession of the land. When the Government ceases to occupy it for the purpose of cutting fuel, he is entitled to full enjoyment, and no fresh right accrues to Government in exchange for the abandoned right to cut fuel.

Ainslie, J.—THE plaintiff in this case is the zemindar of three pergunahs, situated in zillah Midnapore, within which salt was formerly manufactured by the Government. The salt manufacture having now ceased, the Collector called upon the zemindar to enter into a settlement for the revenue to be paid to the Government for the lands formerly occupied by the Salt Department. The zemindar refused to make any fresh engagement, alleging that these lands formed part and parcel of his permanently settled estate, and that the Government had no right to assess them *de novo*. The Collector, thereupon, made a temporary settlement of these lands with the pro formâ defendants. The zemindar now brings this suit to set aside this temporary settlement and to recover possession of these lands as part of his permanently settled estate. The quantity of the lands sued for is 16,665 beeghas.

The material facts alleged are as follows:—Before the accession of the British Government, the plaintiff's ancestors used to manufacture salt through molungees in the first two of the pergunnahs mentioned in the plaint. Subsequently, the British Government having assumed the salt monopoly, granted compensation to the owners of these

Digitized by Google

lands. On the 29th May 1801, the estate of the plaintiff was permanently settled. The revenue assessed appears from a statement which will be found after page 76 of the printed record to be as follows:—On pergunnah Dukhinmal Rs. 3,405-13-6-1; on pergunnah Bahirmootah Rs. 2,913-9-3-3, and on pergunnah Bhaitgur Rs. 55-1-12. That statement also shows that in these sums there are included Rs. 393-11-7-1 and Rs. 697-2-1-2 as khalary rents on the first two pergunnahs in respect of the lands held by the Government. It is further stated that in addition to these khalary rents, the Government used to pay to the zemindar an annual rent for cutting fuel in his estate, at the rates of Re. 1-8 and Rs. 2-8 per man engaged each year in the salt manufacture, and that in the year 1838 in lieu of this varying compensation a fixed sum of Rs. 618-2 per annum was adopted. It is further stated that the Government also granted to the zemindar salt for home consumption. On the 29th July 1863, the Salt Agent of Hidglee gave notice to the plaintiff that the manufacture of salt by Government having been stopped from the 1st of May of that year, as had been already notified by him on the 29th April, all the salt lands held by the Agency had been given over to the Collector that he might make over possession of them to the plaintiff and other owners, and that the rents hitherto paid by the Salt Department had been stopped from the 1st May and would be no longer paid by the Salt Agency. Up to this time the rents payable by the Salt Agency had been credited in the Collector's account as in part payment of the Government revenue.

The Collector, on behalf of Government, has put in an answer in which he asserts that the lands are not claimable by the plaintiff as part of his zemindaree; that if he is entitled to anything he is only entitled to claim the rent; and that the Government is protected by Clause 11 of Section 9 of Regulation I of 1824. He further seeks to draw a distinction between the payments made by Government and rent properly so called.

The Judge has laid down and tried only one issue which is as follows:—"Does "Clause 11 of Section 9 Regulation I of "1824 bar this suit, even if Government has "made any payments with inference to these "lands either as rent or as compensation?" The Judge has drawn a distinction between rent and compensation which it appears to me unnecessary to consider. He has held that the claim is barred by the Clause referred to, and has consequently dismissed the suit with costs.

The question then before us is whether the Clause referred to has been properly applied to this suit, and, if so, whether the order dismissing the suit should have extended to the whole of the 16,665 beegahs claimed or not. It has been contended that Regulation I of 1824 will not apply to these lands, and that the operation of that Regulation is limited to lands within certain districts, namely, 24-Pergunnahs, Jessore, Bhullooah, and Chittagong. The title of that Regulation no doubt sets out, that it is one for declaring in what manner the claims of the zemindars and of the officers in the Salt Department are to be adjusted *in certain districts* where lands are required for the purposes of salt manufacture. The preamble also at first sight would seem to be limited in the same way, but at the conclusion of it there are words of general application. It sets out, passing over matters with which we have no concern in this suit, that "whereas the peculiar circumstances of the "lands required for the purposes of the salt "manufacture in the districts comprised in "the Salt Agencies of the 24-Pergunnahs, "Jessore, Bhullooah, and Chittagong, "and the arrangements concluded with "the zemindars at the time when the "exclusive manufacture was first established, "render it necessary specially to declare the "principles on which the claims of the "officers in the Salt Department and of the "zemindars *in the said districts* are to be "adjusted on the occupation of the land for "the purposes of the Salt Department, the "following rules have been enacted." But it goes on to say that these rules are to be in force not only in the said districts, but as "soon as promulgated, throughout the whole of the provinces immediately subject to the presidency of Fort William." There can be no doubt that the rules contained in Sections 2 to 8 are of general application. The appellant would read the concluding words of the preamble as referring only to those general rules and as modified by the words immediately preceding them, so as to restrict their operation to the four districts named. But looking to the first and second Clauses of the 9th Section, it seems to me that the preamble should rather be read as if the words "and elsewhere" followed the words "in the said districts." There seems to me to be no greater reason for restricting the application of the concluding passage which

Digitized by Google

gives general effect to the rules contained in the Regulation than for extending the rules relating to the Salt Department to other districts than those before named, but the contrary. Taking the concluding words of the first Section by themselves, I do not think that this Court ought to construe them so as to restrict their operation, and looking to the first and second Clauses of the 9th Section I have no doubt that no restriction was intended. The first Clause of the 9th Section recites that from the years 1780 and 1781, the revenue from salt in Bengal, Orissa, and Cuttack is realized in the form of a monopoly of the manufacture and that consequently certain lands have been occupied, and the right of occupation has been assumed by the Government. It then declares that the rules for acquiring lands for public purposes, that is, the rules contained in the second and following Sections of the Regulations up to the 8th are not to apply where land is required for salt manufacture. There is no other Regulation that I know of under which land could have been taken or held for the manufacture of salt except this one; and as it is declared that the rules in the earlier Sections are not to apply to Orissa, &c., it would seem that if the rules in the 9th and the following Sections do not apply to Orissa and to such parts of Bengal as are not specially mentioned in the preamble, there is no rule by which the Government can hold or take land for the purpose of manufacturing salt except in the four districts named in the preamble. The second Clause then recites that there has been an investigation in four specified districts, *viz.*, 24-Pergunnahs, Jessore, Bhullooah, and Chittagong, and enacts that the following rules calculated for all results of such investigation are to be the guide in all cases. There are no words here restricting the operation of the Regulation to the four particular districts. As I understand it this Clause is to this effect; that the nature of the requirements of the Government and the claims of the zemindars having been ascertained by enquiries in certain particular localities, the Government is now in a position to lay down general rules to be enforced not only in those localities, but wheresoever lands may be held or required for similar purposes. Then the third Clause declares what rule was followed when the Government first took lands for the purposes of the salt monopoly. The zemindars were no longer allowed to receive the rents or cesses formerly collected by them from the salt manufactures, and were therefore held not liable to assessment in respect of such assets, and the Government assumed all rights and interests attaching to the mehal. The fourth Clause declares that where claims to remission were allowed in the first instance, that is, on account of khalary rents collected previously to the year 1188, the sums remitted will be allowed in perpetuity. Although by the seventh Clause the remissions, for the purposes of account between the Salt Department and the Revenue Department, were to be retained on the revenue books and debited to the Salt Department, yet in fact it was not, under Clause 4, open to the Government to add anything on account of salt lands to the jumma actually paid by the owner of a permanently settled estate. But then, with respect to these lands, Clause 11 declares that the lands worked by the Salt Department from the time of the assumption of the monopoly to the present day, *i.e.*, to 1824, or otherwise assumed and held before and since the perpetual settlement (although originally belonging to an estate for which a permanent settlement has been formed) shall be considered to be held by the officers of the Salt Department free of rent under a perpetual title of occupancy, and shall be considered to be and to have been liable to assessment by the revenue authorities, when relinquished by the officers of the Salt Department, in the same manner as if they had been farmed by an individual from Government and had become open to re-settlment on the expiration of his lease. Although, originally, the lands in the occupation of Government might have been part and parcel of an estate for which a permanent settlement had since been made, if these lands had been held from the time of the assumption of the monopoly or otherwise held before and since (reading these words conjunctively) the perpetual settlement, they were to be taken as held by the Salt Department under the owner of the estate as occupants in perpetuity not liable to be called on to pay rent. The Government in effect declared that in such cases the assets, whatever they might be, which might accrue from these lands, whether in the form of salt or in any other form, should not belong to the owner of the estate but to the Government. These lands being thus held by the Government as tenants in perpetuity free of rent under the proprietors of permanently settled estates, it seems to me that the proprietors of such estates cannot at any time maintain a claim against the Government in respect of any-

Digitized by Google

thing done by it with these lands. So far the Regulation refers to the lands occupied for the purposes of salt manufacture.

There are other lands occupied by the Government for the purpose of cutting fuel, either to the exclusion of the owner or in which the Government had a right to cut fuel without excluding the zemindar from possession. The rules regarding such lands are to be found in the 14th Section; and Clauses 2 and 3 of that Section declare that where specific lands with ascertained limits are held under an engagement, the right of the Government to cut fuel on these lands shall not be in any way affected, but where there is no such engagement entered into for specific lands with ascertained limits, the Government shall have the right of free fuel from all jungle or waste land lying within estates, the owners of which are allowed a remission of revenue or receive rent from, or on account of the Salt Department, in respect of all khalaries now (that is up to the time of passing the Regulation) established, so long as the said remission and rent shall continue to be allowed and paid; but that if new or additional khalaries are established, fuel is to be procured by agreement with the owner, or cut from other land, the property of Government. If the lands were not held under a specific engagement with ascertained limits, it was open to the zemindar to cultivate and clear them, and to make what use he thought proper of them, the right of the Government extending only to fuel so long as the lands remain jungle. There appears to be no right whatever in the Government to take these lands on the terms on which they take lands for the purposes of salt manufacture under the 9th Section. If there is any special engagement, of course, the parties will be bound by the conditions of it. If there is no special engagement, the zemindar is never ousted from possession of the land; when the Government ceases to occupy it for the purpose of cutting fuel, he is entitled to the full enjoyment of it, and no fresh right accrues to the Government in exchange for the abandoned right to cut fuel.

It, therefore in the view that I take of the case, becomes necessary to consider whether the whole 16,665 beegahs of land in suit was held from before and continually since the permanent settlement up to the 8th of January 1824, the date of the passing of Regulation I of that year, so as to come within the provisions of the 11th Clause of Section 9; and if not the whole, then how much of these lands is affected by that Clause.

In the plaint it is stated that the quantity of the land held at different times varied, but no issue has been laid down on this point, and there has been no trial upon it. It will be necessary for the Court to lay down this issue, and to determine whether any part of the land is exempt from the operation of the 11th Clause of Section 9. It seems to me that on this issue the onus ought to be thrown on the defendant to prove that the claim in whole or in part comes within the operation of that Clause. Admittedly the land was at one time part of an estate of which a permanent settlement has been made with the plaintiff's ancestor as zemindar. The zemindar is primâ facie entitled to re-enter into this part of his estate unless barred by the terms of the enactment. Therefore it is for the defendant, who pleads a limitation of the right of the zemindar, to prove the extent to which that limitation ought to operate. The case must go back to the District Judge to try the issue indicated above, and any other issues which may arise in the course of the hearing of the case. Costs will follow the result.

Mitter, J.—This suit has been brought to recover possession of the plaintiff's share in a large tract of land measuring 16,665 beegahs which was in the occupancy of the Salt Agent of Hidglee till 1864 when it was abandoned by him, and now held by defendants Nos. 2 and 3 under ijarah settlements from defendant No. 1, and for declaration of the plaintiff's proprietary title to it. The plaint alleges that it appertains to pergunnahs Dukhinmal, Bahirmootah, and Bhaitgur which were permanently settled with his ancestor as constituting one estate. The Government retained possession of such lands of the two first mentioned pergunnahs as were then fit for salt manufacture, agreeing to pay compensation and rent for the same, the particulars of which are mentioned in the plaint. That shortly after the permanent settlement of these three pergunnahs which was concluded in the year 1801, the Government took possession of certain other lands in pergunnah Bhaitgur which were found fit for salt manufacture, for which also his ancestor used to receive annual compensation. That after this, whenever any portion of these lands lost their saline quality, and became fit for cultivation, they used to be given up to the zemindar, and similarly such other lands as for the first time became fit for salt manufacture, possession thereof

Digitized by Google

used to be assumed on behalf of the Government. That between 1801, when the permanent settlement was concluded, and 1864, when the old system of salt monopoly was abolished, the Government occupied all such lands of these pergunnahs as were fit for salt manufacture, regularly paying to the plaintiff's ancestor and the plaintiff the rent and compensation stipulated for. That in the year 1864, when the Government abolished the system of exclusive manufacturing of salt under the superintendence of their officers, the lands which are in dispute in this suit were in the possession of the Salt Agent, who, on the 29th July 1863, issued a notice informing the plaintiff that as they were no longer required for salt manufacturing purposes, he, the plaintiff, was at liberty to resume possession of them.

But some months after this, the Collector took a different view of the rights of the parties and served a notice upon the plaintiff's guardian calling upon him to obtain settlements of these lands, evidently treating them as Government property. The plaintiff on attaining majority objected to this without effect, and on his ultimately declining to take the settlement, they were granted in ijarah to defendants Nos. 2 and 3. The plaintiff, therefore, seeks to recover possession of his share in these lands, and for declaration of his *mal* rights to them.

The defendants, on the other hand, allege that the lands in dispute have been in the possession of Government since before the permanent settlement of the plaintiff's zemindaree, which in fact does not comprise it. They also rely upon the provisions of Clause 19 Section 9 Regulation I of 1824, in bar of the plaintiff's suit.

The case coming on for the first hearing, on the 1st of August 1873, before the District Judge of Midnapore, it was found that the plaint was bad inasmuch as it did not specify the lands in dispute. On the intimation of the Court's opinion that it should be dismissed upon this ground alone, the plaintiff's vakeel prayed for postponement with a view to examine certain chittahs in the Collector's hands, and to see whether by their help the lands could be identified. This prayer was granted, and the 8th of August following was fixed for further hearing. The vakeel for the plaintiff on the last mentioned date admitted that the lands claimed by his client were identical with those mentioned in the Government chittahs of 1267, and thus cured the defect in the plaint mentioned above.

The District Judge, after this admission was made, being of opinion that under Section 145 of the Civil Procedure Code, the case could be finally disposed of, without taking any further evidence, dismissed the suit on the ground that Clause 11 Section 9 of Regulation I of 1824 was a complete bar to the plaintiff's claim. He was of opinion that the effect of the admission made by the plaintiff's pleader was to establish that the lands in dispute have been in the possession of the Government "for the purposes of salt manufacture since before the permanent settlement."

Several objections have been raised in appeal, and I am of opinion that the judgment of the Lower Court, upon the materials now upon the record, ought not to be upheld.

The first question which requires determination in this appeal is, whether or not the Regulation I of 1824 applies to this case. It has been urged that the Regulation in question does not refer to salt lands situate within the Hidglee Salt Agency. It in express words refers only to lands within the Salt Agencies of the 24-Pergunnahs, Jessore, Bhullooah, and Chittagong. But it appears to me that this contention is not valid. It is true that the title and the preamble purport to restrict its operation only to lands within the four agencies mentioned above, but referring to the body of the Regulation, it is clear to me that it was intended to be applicable to "the whole of the provinces immediately subject to the presidency of Fort William."

This Regulation is divided into two parts, one portion dealing with the subject of acquisition of lands belonging to private individuals for public purposes, and the other with various questions of rights arising out of the peculiar system of salt monopoly, then in existence. The salt regulations begin with Section 9, and the very first Clause of that Section clearly shows that its provision is not intended to be limited to the four agencies enumerated above.

Then we come to the most important part of the Regulation, *viz.*, the 2nd Clause upon the construction of which, I think, the decision of the particular question now before me mainly turns. This Clause is to the following effect:—"An investigation having "been instituted under the orders of the "Governor General in Council with a view, "first to determine the character of the "remissions of the land revenue allowed "annually from the time of the establishment "of the present system of manufacture, to

Digitized by Google

"certain zemindars in the districts comprised "in the Salt Agencies of the 24-Per- "gunnahs, Jessore, Bhullooah, and Chitta- "gong; and secondly to settle the claims of "the zemindars and the officers of the Salt "Department at the agencies in question "respectively, on each other:—The follow- "ing declarations and rules, calculated for "all results of such investigation, are hereby "made and enacted, and the Courts of Civil "Judicature, the officers of the salt and land "revenue departments and all other public "authorities, are to be by them guided in "their determination of any question that "may arise as to the right of the officers of "the Salt Department to occupy salt lands, "or other lands required for the purposes of "the salt manufacture, and the rate of "compensation to be paid for the same."

I am of opinion that the words in the last portion of this Clause, *viz.*, "to occupy salt lands or other lands required for the purposes of the salt manufacture" refer to *all* salt lands or other lands required for the purposes of the salt manufacture wherever found, if situated in any one of the districts subject to the presidency of Fort William, and the words "calculated for all results of such investigation," have been used to indicate that the four Salt Agencies, *viz.*, those of the 24-Pergunnahs, Jessore, Bhullooah, and Chittagong have been mentioned prominently as constituting typical cases furnishing rules applicable to the whole of the presidency. If we do not give this wide signification to the Clause under consideration, the result will be that cases involving questions dealt with in this Regulation arising within the Salt Agency of Hidglee will be left wholly unprovided for, because there is no other subsequent Regulation or Act on this subject applicable to this Agency. Then, if we refer to other Clauses of this Section and the remaining Sections of the Regulation, we find very general provisions inserted which it would be unreasonable to hold as applicable only to the four agencies in question. I shall illustrate my meaning by one or two examples. For instance, one portion of Clause 7 of Section 9 lays down that "the levy of khalary rents, baree kursa, or the like, from the molungees will be entirely discontinued, and the imposts abolished from the commencement of the next salt year, &c." Now no cause can be suggested, why the molungees of the district of 24-Pergunnahs should have been exempted by the Legislature from this impost and those of the neighbouring district of Hidglee should have been excluded from this benefit. In the absence of any valid cause, I think it would be very unreasonable to hold that this Clause was intended only for the benefit of the molungees in the four agencies specifically named and not for others. The same observation will apply to Clauses 8 and 9 of that Section. For these reasons, I am of opinion that the Regulation I of 1824 is also applicable to the salt lands within Salt Agency of Hidglee, and therefore applicable to this case.

The next question to be determined is whether or not the provisions of the 11th Clause of Section 9 of this Regulation are fatal to the plaintiff's claim, assuming that the lands in dispute have been in the possession of the Government for the purpose of manufacturing salt since before the permanent settlement.

With reference to this question, I think the decision of the Lower Court is not correct. The Clause in question appears to me to refer to lands which at one time appertained to an estate which has been permanently settled, but having been severed from it have become the property of Government. It runs thus:—"Salt lands "worked by the Salt Department from the "time of the assumption of the monopoly "to the present day, or otherwise assumed "and held before and since the perpetual "settlement (although originally belonging "to an estate for which a permanent settle- "ment has been formed) shall be considered "to be held by the officers of the Salt "Department free of rent, under a perpetual "title of occupancy, and shall be considered "to be and to have been liable to assessment "by the revenue authorities, when relin- "quished by the officers of the Salt Depart- "ment, in the same manner as if they had "been farmed by an individual from Govern- "ment and had become open to re-settlement "on the expiration of his lease."

In construing this law, we ought to give effect to all the words in the Clause. Now if we hold that it refers to all salt lands answering to the description given in the first part of the Clause, whether they be the property of Government or of private individuals, then the sentence "although *originally* belonging to an estate for which a permanent settlement has been formed" becomes wholly meaningless. Adopting this construction, it does not occur to me what possible effect can be given to the part of the Clause quoted above. On the

Digitized by Google

other hand, the above words clearly point out that the construction I propose to adopt is the right construction of the Clause in question. Then again, if the other constructions were adopted, most inequitable consequences would have followed in cases which might have possibly arisen under this Clause. Suppose in this case, the very next day after this Regulation was promulgated, the officers of the Salt Department had withheld the payment of rent which they used to pay for these lands, could the persons entitled to that rent enforce its payment? Certainly not, because the law authorizes the Salt Agent to hold these lands free of rent. It is also more than doubtful whether the proprietors of these lands could have got themselves redressed in any other way. I cannot imagine that it was the intention of the Legislature to invest Salt Agents with such arbitrary power, the exercise of which would, in many cases, lead to manifest injustice.

Moreover, I am more confirmed in my view by comparing the last part of this Clause with the provisions of Clauses 3, 4, and 7 of this Section. Now in order to make my argument clear it is necessary to explain the nature of the remissions mentioned in Clauses 3 and 4 referred to above. Clause 3 refers to assets of land adopted for the manufacture of salt, and Clause 4 to collections in the nature of cess or imposts made from molungees employed in the salt manufacturing business. Now the Government, wherever these remissions were granted, became themselves entitled to the ground rents in the one instance, and to the rents which used to be collected from the molungees in the other, and the Salt Agents on behalf of Government were in receipt of them in some shape or other up to the promulgation of this Regulation. The levy of one of these two kinds of rents was by Clause 7 abolished, but the remissions allowed on account of them were directed to be retained on the revenue books and to be carried to the debit of the Salt Department. This provision certainly put the Salt Department to some disadvantage, to compensate which it was provided in the 11th Clause that the salt lands of the nature described in it "should" be considered to be held by the officers of the Salt Department, "free of rent." It appears to me that the salt lands mentioned here are those referred to in Clause 3 of Section 9, and on account of which the zemindars used to enjoy "khalary rents or the like" before the salt monopoly was established; in fact lands the assets of which were transferred to Government on the establishment of the system of exclusive manufacture with the rights and interests attached "to the possession of the mehal" as stated in this Clause. In short, for one kind of remission the loss was debited to the Revenue Department, and for the other to the Salt Department, with this declaration that the lands on account of which remissions were granted under Clause 3, and which were thus severed from the permanently settled estates to which they *originally* appertained and became the property of Government as stated in the last part of the Clause in question, shall be liable to assessment by revenue authorities, when relinquished by the officers of the Salt Department. Therefore reading all these Clauses together, specially having regard to the qualifying sentence referred to above, *viz.*, "although originally belonging, &c." I am of opinion that the salt lands mentioned in this Clause are those which by operation of the 3rd Clause have become the property of Government.

Upon this part of the case I shall refer to one more Section of this Regulation which it seems to me lends considerable support to my view. I mean Section 12 which is to the following effect:—"No cultivation shall be "allowed within the limits of any chur or "other lands transferred to the Salt Depart- "ment, unless with the permission of the "Board of Customs, Salt, and Opium, so "long as the manufacture shall be continued "on the same; and it shall and may be law- "ful for the Salt Agent and his subordinate "officers, to attach, confiscate, and dispose of, "as may be directed by the Board, any crops "grown on such land in contravention of "this rule, and to require the police to aid "him in doing so. Any person illicitly culti- "vating, clearing, or ploughing such land, or "doing any act preparatory to its cultiva- "tion and clearance or causing another to do "so, shall, on conviction before a Magistrate, "be subject, for every such offence, to a fine "not exceeding five hundred rupees, besides "being liable in a civil action for any damage "which the Salt Department may sustain; "provided, however, that if any chur or other "salt land, occupied as above, shall become "through natural causes useless for the "purposes of the Salt Department, the pro- "prietor thereof shall be entitled to recover "possession of the same, on establishing the "fact to the satisfaction of the Board of "Customs, Salt, and Opium, or by a regular "suit in Court, and on relinquishing the "compensation paid to him by the Salt Agent "for the use of the land."

Digitized by Google

Now if the construction for which the defendants contend be put upon the 11th Clause, certainly it would militate against the proviso of the Section last quoted. Upon these grounds, I am of opinion that as the lands in dispute have not been shown to be the property of Government under Clause 3 of Section 9 of Regulation I of 1824, the 11th Clause of this Section has no application to the case. This being so, the judgment of the Lower Court which is entirely based upon that Clause cannot stand.

In this view of the law, it is immaterial for the present to see whether the finding of the Lower Court that the lands in dispute have been held by the Government for salt purposes since before the permanent settlement is correct or not. But it may become material with reference to any other question which may arise between the parties should the case be ultimately remanded. For this reason, I think it right to express my opinion upon this part of the case also. The District Judge in one passage of his judgment seems, though not very clearly, to put it upon the basis of an admission by the plaintiff's pleader. Certainly the admission which has been recorded does not go to this length. It simply goes to establish that the lands mentioned in the Government chittahs of 1267 are the lands for which this suit has been brought. It has been argued before us that as the chittahs state that those lands have been in the possession of the Government from a period anterior to the permanent settlement, therefore the statement made by the plaintiff's pleader impliedly admits also the facts mentioned in them. I do not think that this contention is well founded. By admitting that the lands in dispute are identical with those described in the chittahs, the plaintiff should not be considered to have admitted that every statement made in these chittahs are correct. If we exclude this supposed admission from our consideration, then it follows that this fact must be established by other evidence before it can be accepted. The finding of the District Judge upon this contested point cannot therefore stand, parties not having been allowed sufficient opportunity to complete their evidence. For these reasons, I would reverse the judgment of the Lower Court, and remand the case under Section 351 of Act VIII of 1859 for the determination of other questions arising in it.

The 20th January 1875.

Present:

The Hon'ble Romesh Chunder Mitter, *Judge.*

Possession—Title by Purchase.

Case No. 1504 of 1874.

Special Appeal from a decision passed by the Officiating Judge of West Burdwan, dated the 29th April 1874, *affirming a decision of the Moonsiff of Bishenpore, dated the 12th March* 1873.

Nobin Mohun Nundee and others (Plaintiffs) *Appellants,*

versus

Ram Taruk Bural and others (Defendants) *Respondents.*

Baboo Kalee Kishen Sen for Appellants.

Baboo Rash Beharee Ghose for Respondents.

In a suit to recover possession which had been lost after enjoyment for more than 12 years, HELD that plaintiff would be entitled to recover the property even if unable to establish the kobala under which he claimed to have purchased.

THE dispute in this case is with reference to a small piece of land. The plaintiff's allegation is that long before 1249, the ancestors of defendants Nos. 2 and 3 and defendants Nos. 4 and 5 held the land in dispute; that they sold it to the plaintiff on the 10th Chyet 1249, under a kobala executed by them; and that the plaintiff was in possession from that time up to 1278, when he was dispossessed.

The defendants, on the other hand, urge that the land in dispute belonged to the ancestors of the defendants Nos. 2 and 3 only, and after their death to the defendants Nos. 2 and 3; that it was never purchased by the plaintiff; and that, in execution of a decree against the defendants Nos. 2 and 3, it was sold and purchased by the defendants themselves in Pous 1278.

Both the Courts below dismissed the plaintiff's claim.

The Moonsiff found that the plaintiff's possession was not proved, and also that the kobala set up by him was not established.

On appeal the District Judge has upheld the judgment of the first Court with reference to the question of the genuineness of

Digitized by Google

the kobala; and with reference to the question of possession he is of opinion that it should not be considered in this case, as the plaintiff is not entitled to succeed on the strength of his possession when the kobala is not proved.

I think that this judgment is erroneous, and must be set aside. The evidence of possession was material, and if considered in conjunction with the evidence of execution of the kobala, it might have supported the plaintiff's allegation of purchase in the year 1249; and then again if it were established that the plaintiff had been in possession for more than 12 years before his dispossession he would be entitled to recover this property notwithstanding that his kobala be not established. For these reasons it appears to me that the District Judge was not right in excluding the evidence of possession from his consideration.

It has been urged by the pleader for the respondent that even admitting that the District Judge was not right in excluding the evidence of possession, it is not necessary to remand the case, because he was not right in holding that the Moonsiff refused to examine any of the witnesses adduced by the plaintiff to prove possession. This objection does not at all touch the first ground upon which, as I have observed before, the Judge's judgment is erroneous, because there is already on the record evidence of possession. But with reference to the second ground upon which I think the Judge's view of the law that the evidence of possession is unnecessary is erroneous, I do not think that it is necessary for me to go into the objection raised by the pleader for the respondent. It will be open to him to argue this question before the District Judge again; and the reason why I decline to enter into it is this, that notwithstanding that the plaintiff may fail to establish that he is entitled, as a matter of right, to have certain witnesses examined, he may yet succeed in obtaining the permission of the District Judge to adduce fresh evidence in the appellate stage under the provisions of the Procedure Code. On this ground I think it is now premature for me to entertain that objection.

The case will, therefore, be remanded to the Lower Appellate Court for a fresh trial of the appeal. The respondent will then be at liberty to argue the objection which I have noticed as taken before me in answer to the grounds of special appeal.

Costs will follow the result.

The 20th January 1875.

Present:

The Hon'ble Romesh Chunder Mitter, *Judge.*

Possession—Title—Declaratory Decree.

Case No. 1602 of 1874.

Special Appeal from a decision passed by the Officiating Judge of West Burdwan, dated the 17th April 1874, modifying a decision of the Moonsiff of Bishenpore, dated the 27th February 1873.

Juggut Chunder (Plaintiff) *Appellant,*

versus

Banee Madhub Banerjee and others (Defendants) *Respondents.*

Baboo Golab Chunder Sircar for Appellant.

Baboo Bungshee Dhur Sen for Respondents.

Where the possession of a plaintiff suing for a declaration of title extends over a period of more than twelve years, and the nature of that possession is such that it can be successfully relied upon as a bar to a suit by a stranger to recover possession, a Court of justice is competent to declare his title upon such possession.

I THINK the judgment of the Lower Appellate Court in this case ought not to stand.

The suit was brought by the plaintiff for declaration of his title to a piece of land which he alleged appertained to a lakheraj mouzah called Morakoorkenabaree; and that in the course of a settlement of a neighbouring resumed lakheraj mehal it has been measured as part of the latter, the Deputy Collector who was conducting the settlement proceeding having overruled the objection of the plaintiff. The defendant, on the other hand, claimed this piece of land as appertaining to the resumed land mentioned above.

The Moonsiff decreed the plaintiff's claim.

On appeal the Judge has modified that decree. He finds in his judgment that the plaintiff has shown continuous possession

Digitized by Google

of the disputed land for several years, and that the defendant has not proved any actual possession of the land, but rests his title on a chittah of 1837. After coming to this conclusion he was of opinion that the plaintiff was not entitled to have the declaration sought for on establishing the fact of possession only. Then he refers to the chittah of 1837, prepared by the Government officer conducting the settlement proceedings of the resumed mehal, and having found that only a portion of the disputed land is outside the chittah, he has decreed the plaintiff's claim with reference to that portion only.

It appears to me that his judgment is erroneous. If the plaintiff and his predecessor were in possession for a period sufficient to bar the claim of the defendant, that would be a sufficient title upon which the plaintiff could be entitled to the declaration which he has sought for in this case. The decision reported at page 104, XX Weekly Reporter, in the case of Ram Lochun Chuckerbutty and another *v.* Ram Soonder Chuckerbutty, is exactly in point. The respondent's pleader has quoted a case from VI Madras Reports, 420. It is true that this case supports the view taken by the District Judge, but, for the reasons stated in the decision reported in the XX Weekly Reporter, I am inclined to hold that the Judge was not right in the proposition of law which he has laid down. I would, therefore, follow the latter case. But in coming to apply the principle laid down in the case reported in XX Weekly Reporter, I find that the finding of the Judge is not explicit enough upon the point. He simply says that the plaintiff has proved possession for several years. No doubt, referring to the evidence on the record, I find that the possession of the plaintiff extended over a period of more than twelve years; and it appears from the judgment that the Judge has acted upon this evidence. But the case having come up before me in special appeal, I do not think I am justified in assuming that the Judge would have found upon that evidence that the plaintiff was in possession for twelve years. This being so, the only course left for me to follow is to remand the case to the Judge with this direction that if he be satisfied upon the evidence on the record that the plaintiff's possession extended over a period of more than twelve years, then the plaintiff's suit should be decreed.

The District Judge, in his judgment, has referred to a hypothetical case in order to show that the proposition of law laid down by him is correct. I do not think that he meant to say that the facts of the present case exactly correspond with those of the case supposed by him. But if they do, he is right in holding that the plaintiff's title is not made out. In the case supposed by him the possession of the parties seeking for declaration of title is not of such a nature as may be relied upon to bar a suit for possession brought against them. Where possession extends over a period of more than twelve years, and the nature of that possession is such that it can be successfully relied upon as a bar to a suit by a stranger to recover possession, a Court of justice is competent to declare the plaintiff's title upon such possession.

With these remarks I remand the case to the District Judge for a fresh decision.

Costs will follow the result.

The 21st January 1875.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Hindoo Law (Mitakshara)—Joint Property—Act XL of 1858.

Case No. 301 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Bhaugulpore, dated the 25th July 1874.

Mussamut Ajhola Kooeree (Petitioner) *Appellant,*

versus

Baboo Digambur Singh (Opposite Party) *Respondent.*

Baboo Tarucknath Dutt for Appellant.

Mr. M. L. Sandel for Respondent.

Follows the ruling in 21 W. R., 143, that where joint property is enjoyed in its entirety by the whole family, the interest of one member cannot be taken charge of under Act XL of 1858.

Kemp, J.—This is an application on the part of the petitioner for a certificate under the provisions of Act XL of 1858. The Judge has held that, under the ruling of this Court to be found in Volume XXI, Weekly Reporter, 143, he is precluded from granting the certificate asked for in this case. We think the decision of the Judge with reference to that case is a correct one, and we dismiss the appeal, but without costs.

Digitized by Google

The 22nd January 1875.

Present :

The Hon'ble E. G. Birch and W. F. McDonell, *Judges.*

Act VIII (B.C.) of 1869 *s.* 102.

Case No. 453 of 1874.

Miscellaneous Appeal from an order passed by the Officiating Judge of the 24-*Pergunnahs, dated the* 8*th August* 1874, *affirming an order of the* 1*st Moonsiff of Alipore, dated the* 4*th July* 1874.

Kedarnath Biswas (Judgment-debtor) *Appellant,*

versus

Huro Pershad Roy Chowdhry (Decree-holder) *Respondent.*

Baboos Aukhil Chunder Sein and *Bharut Chunder Dutt* for Appellant.

Baboo Bhowanee Churn Dutt for Respondent.

The word "suit" in Act VIII (B.C.) of 1869 s. 102, covers all proceedings whether prior or subsequent to decree.

Birch, J.—We think that no special appeal will lie in this case. The order that was passed by the Judge was in a case for arrears of rent below Rs. 100, and we think that, as pointed out in the decision reported in XIX Weekly Reporter, 307, the word "suit" in Section 102 of Act VIII (B.C.) of 1869 is intended to cover all proceedings prior to decree and subsequently in execution.

The appeal must, therefore, be dismissed with costs.

The 22nd January 1875.

Present :

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Execution—Compromise—Act XXIII of 1861 *s.* 11.

Case No. 452 of 1874.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Patna, dated the 28*th September* 1874.

Syud Velayet Hossein and others (Judgment-debtors) *Appellants,*

versus

Syud Wulee Ahmed (Decree-holder) *Respondent.*

Mr. C. Gregory for Appellants.

No one for Respondent.

Where a refund is claimed of the proceeds of an execution sale on the ground that the decree has been satisfied by compromise, the case ought to be tried under Act XXIII of 1861 s. 11.

Kemp, J.—We think that the order of the Subordinate Judge in this case cannot stand. He has held that he is not competent, under the provisions of Section 11 Act XXIII of 1861, to try this case, and has referred the petitioner before us to a regular suit. The sale was held in execution to satisfy a decree passed on the 14th of September 1867 in a suit brought by the respondent before us for contribution. The case of the appellants before us is that, under the terms of a compromise entered into between them and others, including the special respondent before us, the decree of the 14th of September 1867 is satisfied, and that they are therefore entitled to a refund of the sale proceeds of the sale held in execution of that decree.

We think that this case ought to be tried under Section 11 Act XXIII of 1861, and if the Subordinate Judge finds that the compromise entered into between the parties and referred to in the decision of the High Court refers to the decree obtained by the respondent on the 14th September 1867, the appellants will be entitled to a refund of the sale proceeds.

With these remarks we remand the case for a retrial to the Subordinate Judge. Costs to follow the result.

Digitized by Google

[PRIVY COUNCIL JUDGMENT.]

The 30th January 1875.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Copies—Secondary Evidence—Mahomedan Law—Deed of Gift—Gift by Guardian—Mushâ—Gift of Undivided Things—Issues—Special Appeal.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Mussumat Ameeroonnissa Khatoon and others

versus

Mussumat Abedoonnissa Khatoon and others.

Where a copy of a deed is tendered as evidence, and the party tendering it fails to comply with the conditions required to make the copy statutory proof of the deed, he is at liberty to give other secondary evidence of the contents of the deed, if the non-production of the original has been duly accounted for.

The general principle of the Mahomedan law that a gift is invalid where there is want of acceptance and seisin by the donee, is subject to the exception that where there is, on the part of a father or other guardian, a *bonâ fide* intention to make a gift, the law will be satisfied without change of possession, and will presume the subsequent holding of the property to be on behalf of the minor.

The rule of Mahomedan law that the gift of *Mushâ*, or an undivided part in property capable of partition, is invalid, does not apply to definite shares in zemindaries, which are in their nature separate estates with separate and defined rents.

Where an issue was not raised in the Court of first instance, nor taken in the ground of appeal, it is too late to set it up for the first time in special appeal, specially if the evidence has not been directed to it.

THIS suit was brought in the Civil Court of Dacca by Moulvie Wahid Ally against his father, Moulvie Abdool Ally, in his own right, and as the heir of his deceased wife Eftekhurunnissa, and as the husband of another wife, Ameeroonnissa, to set aside three ikrarnamahs, or agreements, on the allegation that they were forged. These ikrars, if genuine, modified the operation of three hibbanamahs, or deeds of gift, two purporting to be executed by his father, and one by his mother Noorunnissa, containing, ostensibly, absolute gifts to Wahid Ally of various properties of considerable value. The plaint also prayed that Wahid Ally might be put into possession of these properties, and that the decree of the Magistrate in a suit under Act IV of 1840, maintaining his father in possession, might be set aside. Mr. Barry and others claiming under pottahs from the father, were also made defendants. Their title must stand or fall with Abdool Ally's; and they did not appear on the hearing of this appeal.

The questions in the suit relate to the genuineness and validity of the three hibbanamahs and the three ikrars. Each of them was on some ground impeached.

The Judge of Dacca dismissed the suit (except as to an 8-anna share of some property of the plaintiff's mother Noorunnissa, which it was admitted he was entitled to), holding that the first alleged hibbanamah of the father was not proved, and that the second and third from the father and mother, respectively, were invalid by Mahomedan law, there being, as he found, no delivery and acceptance of the gifts, or change of possession. He also held that the ikrars were genuine and valid.

The High Court reversed this decree, and the grounds and nature of their own decree, which is the subject of the present appeal, are thus stated at the conclusion of their judgment:—"Our decree will proceed on the basis of the validity of the three deeds of gift, and the invalidity of the later documents (the ikrars). We shall declare that Moulvie Wahid Ally was in his lifetime, and that those who are now by law his heirs and representatives, are entitled to a decree for setting aside the documents relied upon by the respondents, and for the recovery of the property sued for."

Wahid Ally died before the decree appealed from, and the father subsequently. The parties to this appeal are their respective representatives.

It appears that at the date of the alleged hibbanamahs, Abdool Ally had two wives, Noorunnissa, the mother of Wahid Ally, and Eftekhurunnissa. Wahid was his only son, and he had one, or at most, two daughters. Abdool afterwards married a third wife, Ameeroonnissa, and the third ikrar purports to be made on the occasion of this marriage.

The first hibbanamah, in order of time, is dated the 14th Magh 1254, and purports to convey, by way of gift from the father, some lakheraj lands charged with religious trusts belonging to the Kuddum Russool Durgah at Noabaree, and to appoint his son Mutwallee

* From the judgment of Morgan and Pundit, JJ., decided on the 14th March 1864,—Gap. No. W. R., 121.

Digitized by Google

of the Durgah in his place. The document also contains an appointment by the father of Moonshee Kolumoodeen Mahomed to be the guardian of his son for the business of the Durgah during his minority.

The original of this deed was not produced; and their Lordships, during the argument, declared their opinion that its non-production was not sufficiently accounted for to allow of secondary evidence being given of its contents. It appeared upon the plaintiff's evidence that the original deed had been delivered to the guardian Moonshee Kolmoodeen, but this person was not called as a witness, nor was his absence explained. It is to be observed that, although the document tendered as evidence,—*viz.*, what purported to be a copy of the deed from the Registry,—showed that the instrument, if really executed, was signed by numerous subscribing witnesses, none of them were called to prove its existence and execution. Supposing, therefore, that secondary evidence had been admissible, neither of the two conditions required to make the copy statutory evidence of the deed by virtue of Regulation XX, 1812 (sec. 2, cl. 5), was complied with. It was not shown that the original was "lost, destroyed, or not forthcoming,"—that is to say, its non-production was not satisfactorily accounted for, nor was there any proof by any of "the subscribing witnesses" that the original had been duly executed.

No doubt, although the statutory proof failed, other secondary evidence might have been given of the contents if the non-production had been duly accounted for. It was suggested that the deed may have remained with the father, but this suggestion is opposed to the evidence; and further, the custody of the father would not be, according to the supposed terms of the deed, the proper custody. In their Lordships' opinion, therefore, no sufficient foundation was laid for the admission of secondary evidence.

Objections made with the view of excluding evidence are not received with much favour at this Board, but it is sometimes necessary for the right decision of the merits of the controversy between the parties to give effect to them. In the present case the surrounding circumstances raised no presumption of the existence of the deed, and the question of the custody bore materially on the issue to be determined.

The execution of the two other hibbanamahs by Abdool Ally and Noorunnissa respectively is not denied. The first of them is dated 19th Assin 1256, and purports to be a gift from Abdool Ally to his son of certain jumma lands, *viz.*, his 10-anna share of the zemindary of Noroollapore, and shares of other zemindaries. This deed, which recites that Abdool Ally had only one son Wahid, and a daughter Sremootee Fukhurunnissa, who was well provided for by her husband; that he had already bestowed some of his property on his wife, Noorunnissa, and that he wished to prevent quarrels at his death and to enable his son to live well, contains an absolute and present gift from the father to the son of the above-mentioned properties.

The deed from the mother, Noorunnissa, is dated 24th Joistee 1258, and purports to be a present and absolute gift to her son of certain shares of the zemindary of Pergunnah Boro Bajoo, and of other zemindaries. Some of these properties originally belonged to Noorunnissa in her own right, and others had been transferred to her by her husband. The deed states that the son being a minor, the father, as his guardian, had acknowledged the gift.

These two hibbanamahs were duly registered, but no mutation of names was made.

It has been found by the High Court that Wahid became of full age, *viz.*, 18, in 1261; consequently, at the date of the hibbanamah from the father he was a child only 10 or 11 years old.

The Courts below substantially agree in their conclusions of fact upon the evidence with regard to the possession and management of the properties. They both find that although all proceedings relating to the estate were subsequently to the hibbahs in the son's name, the father remained in actual possession and receipt of the profits of the properties and in the uncontrolled management of them.

The Principal Sudder Ameen was of opinion, on these facts, that the transfers to the son were "purely nominal," and that the father did not intend that any property should pass by them, or at least whilst he lived; and he further held that the gifts were invalid by Mahomedan law for want of acceptance and seisin by the donee.

The High Court, however, came to the conclusion that the transfers were not colourable, but intended to operate as real gifts. They also held that "when the guardian of a minor is himself the donor, and in possession of the property, no formal delivery and seisin is required," citing in support

Digitized by Google

of this exception to the general law "Macnaughten's Principles of Mahomedan Law," Chapter V, Sections 9 and 10.

It was not denied by the learned Counsel for the appellants that the High Court had on this last point taken a correct view of the law, nor do their Lordships doubt that where there is, on the part of a father or other guardian, a real and *bonâ fide* intention to make a gift, the law will be satisfied without change of possession, and will presume the subsequent holding of the property to be on behalf of the minor.

It was, however, strongly insisted by the appellants' Counsel that the Principal Sudder Ameen was correct in considering that the transfers were colourable, and only with the view of making the son the ostensible owner; or, if not purely *benamee*, that they were not intended to operate exclusively for the son's benefit, but were made subject to a future family settlement. It is enough for their Lordships in this place to say there are circumstances in the case which favour this contention, at least as regards the transfer from the father; but they do not think it necessary to go at large into this question, for, having come to the conclusion, for reasons to be hereafter stated, that the three ikrars alleged to be executed by the son are genuine documents, they think the rights of the parties must be determined on the basis of the combined operation of the hibbas and ikrars. It is clear also that the father, who set up in his defence to this suit these ikrars as valid instruments, cannot now be allowed to aver that the hibbas to which they relate were intended to have no operation and effect.

A legal objection to the validity of these gifts was made in the High Court on the ground that the gift of Mushâ, or an undivided part in property capable of partition, was, by Mahomedan law, invalid. This point appears to have been taken for the first time in the High Court, and was argued at this bar. That a rule of this kind does exist in Mahomedan law with regard to some subjects of gift is plain. The Hedaya gives the two reasons on which it is founded: First, that complete seisin being a necessary condition in cases of gift, and this being impracticable with respect to an indefinite part of a divisible thing, the condition cannot be performed; and, secondly, because it would throw a burden on the donor, he had not engaged for, *viz.*, to make a division. (See Book XXX, c. 1, 3 vol., 293.) Instances are given by text-writers of undivided things which cannot be given, such as fruit unplucked from the tree and crops unsevered from the land. It is obvious that with regard to things of this nature separate possession cannot be given in their undivided state, and confusion might thus be created between donor and donee which the law will not allow.

In the present case the subjects of the gift are definite shares in certain zemindaries, the nature of the right in them being defined and regulated by the public Acts of the British Government. The High Court, after stating that the shares "were for revenue purposes distinct estates, each having a separate number in the Collector's books, and each being liable to the Government only for its own separately assessed revenue," and further, that the proprietor collected a definite share of the rents from the ryots, and had a right to this definite share and no more, held that the rule of the Mahomedan law did not apply to property of this description.

In their Lordships' opinion this view of the High Court is correct. The principle of the rule and the reasons on which it is founded do not in their judgment apply to property of the peculiar description of these definite shares in zemindaries, which are in their nature separate estates with separate and defined rents. It was insisted by Mr. Leith that the land itself being undivided and the owners of the share entitled to require partition of it, the property remained Mushâ. But although this right may exist, the shares in zemindaries appear to their Lordships to be, from the special legislation relating to them, in themselves and before any partition of the land, definite estates, capable of distinct enjoyment by perception of the separate and defined rents belonging to them, and therefore not falling within the principle and reason of the law relating to Mushâ.

Mr. Cowie, in his argument, contended that the rule only applied to cases where the donor himself retained some share of the property, and not to those where the owner gave all his own interest in undivided shares to the donee. The authorities on Mahomedan law do not seem to be agreed on this point; and after the opinion they have just expressed, their Lordships need not enter upon the consideration of it. Indeed, but for the great practical importance of the question they would have thought it unnecessary to express their opinion on the subject-matter of the gift, since if the hibbas

Digitized by Google

are to be construed, as they think they should be, by the light reflected upon them by the ikrars, absolute and pure gifts of the property were not intended; and therefore the principles of law governing such gifts are not applicable to the transaction.

Their Lordships will now proceed to consider the ikrars. The first two are dated on the 20th Falgoon 1259. One is addressed by Wahid to his father, Abdool; the other to his mother, Noorunnissa.

That from Wahid Ally to his father recites the hibba of the 19th Assin 1256, and that his father, mother, and "half-mother" being alive, full brothers and sisters, and half brothers and sisters might be born to him. After further reciting that Abdool, by reason of his gift to Wahid, was unable to make suitable arrangements for their maintenance, it became incumbent on him to do so out of the property received by him in gift. It then contains an agreement by Wahid to maintain his sister Koreemunnissa and any other sisters or half-brothers to be afterwards born, in joint mess during their minority, and on their becoming of age, to allow them certain fixed stipends for maintenance. He also agreed, in case any full brothers should afterwards be born, that he and they, subject to such allowances, should enjoy the properties in equal shares. These words follow this disposition: "And thus I do make my brothers and sisters co-sharers in the property received by me in gift, and the profits thereof." The ikrar concludes by declaring that during the father's lifetime, the whole of the property named in it will remain in the father's charge, and under his management and control.

The ikrar to the mother contains analogous dispositions by Wahid in respect to the property contained in her hibba of the 24th Joistee 1258, except that the provisions for maintenance and shares are confined to his uterine sister Koreemunnissa, and any uterine brothers and sisters to be afterwards born. It also contains a provision for the payment of 250 rupees per mensem to his mother for her life. This ikrar concludes, like that to the father, by declaring that, as long as his father lived, he will have the entire management of the property named in it, of the collection of the rents, &c., and of all business connected therewith.—"I shall not interfere with it."

The High Court do not apparently dissent from the finding of the Principal Sudder Ameen that these ikrars were executed by Wahid. They say: "We should very reluctantly interfere with the finding of the Lower Court that these ikrars are genuine. They were registered when made. It is not probable they remained unknown to the plaintiff until the year 1864, as we understand him in effect to allege in his plaint." But they declined to give effect to them on the grounds, apparently, that the son was a minor, and that they were obtained by undue influence.

It is to be observed that neither the plaint nor the issues distinctly raise these points. The plaint alleges that the ikrars were forged, and the only issue directed to these instruments is in the following terms:—"Are the three ikrars said to have been given by the plaintiff to the defendant genuine and valid deeds?" Granting that the objection that the ikrars were obtained by undue influence, might, if the previous proceedings had raised it, be held to be comprehended in the word "valid" in the issue (although their Lordships think such an issue ought always to be raised in a more pointed form), the question does not seem to have been in fact raised before the Principal Sudder Ameen, nor was it taken in the grounds of appeal against his judgment. In their Lordships' opinion, therefore, it was too late to set up this defence for the first time before the High Court, especially as the evidence does not seem to have been directed to it, which would certainly have been the case if the parties had originally intended to make it an issue in the cause.

The disability of Wahid Ally arising from his being a minor when the first two ikrars were given depends on the question whether his minority is in this case to be determined by the Regulations of 1793. As regards the fact, it was admitted by the respondents' Counsel that Wahid, when he made these ikrars, was fifteen, the age at which, by the general Mahomedan law, he would have been competent to act for himself; but they denied that he was then eighteen, and their Lordships are satisfied that the High Court were right in their conclusion of fact from the evidence that he did not reach eighteen, the age fixed for the minority of Mahomedan proprietors of estates paying revenue to Government by Regulation XXVI of 1793, section 2, until 1261, which was subsequent to the date of the two ikrars.

If it had been necessary for their Lordships to determine whether the period of minority was governed by this Regulation, they would be strongly disposed to hold that

Digitized by Google

it was. In dealing with these ikrars, Wahid must be assumed to be the proprietor of the revenue-paying estates referred to in them; and inasmuch as they contain dispositions of such estates, the period of his minority, at least for this purpose, would seem to be within the policy and terms of the Regulation and governed by it. But this point becomes immaterial, since their Lordships are of opinion upon the evidence that the Principal Sudder Ameen was right in finding that the third ikrar, which refers to the two earlier ones, and in substance confirms them, is a genuine instrument.

It is not denied that this ikrar, if genuine, was executed after Wahid was of the full age of eighteen, and the most disputed, and obviously the most important, question of fact in the cause is, whether it is genuine, or was, as Wahid alleges, forged by his father.

This ikrar bears date the 16th Aughran 1263, and was made, as before observed, upon the occasion of Abdool's marriage with a third wife, Ameeroonnissa. After reciting the two hibbas from the father and mother, it thus refers to the two former ikrars:—"That I, being your only son, and on account of your having no other son, possessed of all your affections, you had, so as to prevent that any disputes could arise with any one in future, bestowed upon me, by your favour, and through the execution of a deed of gift, dated the 19th Assin 1256, your ancestral zemindaries specified in the schedule, and situated within the Collectorate of Zillah Dacca, *viz.*, a 10 as. 13 gs. 1 c. 1 k. share of Pergunnah Noroollapore, and your 7-anna share of Pergunnah Idrakpore, situated within Zillah Backergunge. Besides this, having settled upon my late mother, Noorunnissa Khatoon Saheba, as her marriage dower, your zemindary of Tuppah Awalee Jahanabad, situated within the Collectorate of the aforesaid Zillah Dacca, and your talooks, &c., my mother aforesaid, as the owner thereof, bestowed them upon me through a deed of gift dated the 25th of Joistee 1258, and I, being the owner and in possession of that property, worth, in accordance with the deed of gift, 80,000 rupees, I did formerly give and execute, as addressed to you and to my mother, the aforesaid Khatoon Saheba, separate ikrars (agreements) to the effect that all the properties named in the schedule of the aforesaid deeds of gift and other properties should, during your lifetime, remain under your control and in your possession. That I did not possess the right of sale and gift over that property, and that, should uterine brothers to me be born, the property received in gift from my mother should be enjoyed by all of us in equal shares, and promising, should I have sisters, or half-brothers and sisters, to make monthly allowances to them." It then recites that the father had contracted a marriage with Ameeroonnissa, who is stated to be a lady of good family; that provision had been made for the children of the former marriages by the earlier ikrars; and that it was proper to make some for her and any children to be born of the intended marriage. It then states an agreement by Wahid to make allowance to the daughters of the marriage, his half-sisters, and that, should any sons be born, they, his half-brothers, should enjoy the property with him in equal shares, adding, "and thus I constitute my brothers and sisters sharers in the property and in the profits thereof." Wahid then grants an allowance to Ameeroonnissa of 150 rupees per month for her table, and 500 rupees a year for her clothes. The ikrar contains a statement that the father was in possession of the property by virtue of the former ikrars, and concludes by declaring that it will remain in his control and management during his lifetime, and that neither Wahid nor his heirs should interfere or lay any claim thereto.

This ikrar was registered soon after its date. It is sealed with Wahid's seal, but not signed. Five witnesses, two of whom were cited by both sides, deposed that the seal was affixed to the ikrar by Wahid himself in their presence, and there is no opposing evidence. Wahid was not called to negative the personal execution of the ikrar attributed to him by the witnesses; and their Lordships cannot but think, whilst making due allowance for the dislike of Mahomedans of rank to give evidence in the Courts, that it was his duty if the instrument had been forged to give the Judge the opportunity of hearing his own evidence. His not having done so naturally conduces to the belief that the witnesses who proved his execution of the ikrar have spoken the truth. The Principal Sudder Ameen gave credit to them, and the High Court, who overruled his finding, which affirmed the genuineness of this ikrar, appear to rest their decision partly on the want of Wahid's signature to the ikrar, but mainly on the improbability that, under the circumstances, he should have made the arrangement it contains.

The signature was not necessary; but no

Digitized by Google

doubt its absence made it proper that the proof of the affixing of the seal should be clear and convincing. This evidence, it seems, was supplied; five witnesses, to whom the Principal Sudder Ameen gave credit, having proved that the seal was affixed to the document in their presence by Wahid Ally himself.

In considering the improbability that the son would make such an ikrar, the High Court seem to assume that there was at its date dissension between the father and the son; but it would seem from the evidence that this did not occur until after the father's marriage with Ameeroonnissa, and no proof was given that Wahid was opposed to this marriage. His own mother, Noorunnissa, was then dead. Undoubtedly domestic quarrels afterwards arose, which led to a separation of the son from the father's house, and from that time the relations of the parties were hostile.

Supposing, then, the father and the son to have been on good terms at the date of the ikrar, there would seem to be, according to Mahomedan family usage, and having regard to the disposition of the property under the previous hibbas and ikrars, nothing really unjust or improbable in the arrangement. Wahid had only one uterine sister, Fukhrunnissa, and his own mother being dead, he could have no more brothers or sisters of the full blood. His father's second wife, Eftekhurunnissa, appears to have had no children, and it was probably thought she would have none. In this state of the family, it would seem just and reasonable that the son, who held the bulk if not all the family property under the hibbas, should join in making some provision for his father's new wife and the possible children of the marriage. It is true that in this ikrar he agrees to make his half-brothers of this marriage equal sharers with himself, whereas in the former ones only his brothers of the full blood were so to share; but his mother was living when the former ikrars were given, and it was then possible he might have had uterine brothers.

Granting, however, that the arrangement in the last ikrar may have been too disinterested to have been altogether probable, if the property had been unquestionably the son's, it does not follow that there is the same or any want of probability in it when his title was only derived from the hibbas, and his father was still in actual possession and enjoyment of the property.

The High Court assumes that the father really intended to denude himself of his property and to make an absolute gift of it to his son, although he had two wives living, and probably contemplated marrying, as he afterwards did, a third; and on this assumption they regard the arrangements of the last ikrar to be improbable.

Their Lordships, however, in considering the probability of its execution, are disposed to adopt the opinion of the Principal Sudder Ameen that an absolute gift was not intended, and that the transaction was either purely benamee, or, more probably, to be followed by a family settlement. In this view of the case the improbabilities relied on by the High Court vanish, and the direct evidence of the execution of the instrument ought to prevail.

The result of establishing the third ikrar will be to confirm and give effect to the two former ones, which must be construed with it. The rights of the parties ought, therefore, in their Lordships' opinion, to be governed by the provisions contained in the hibbas of the 19th Assin 1256 and the 12th Joistee 1258, and in the three ikrars, read and construed as a whole; and may be declared and enforced, if necessary, in a suit properly framed for that purpose.

The form of the present suit does not allow of these rights being so declared in it. The only prayer in the plaint is to have the ikrars set aside as fabricated, and the plaintiff put into possession of the properties claimed with mesne profits. Their Lordships being of opinion that the ikrars are genuine, the prayer to set them aside cannot, of course, be granted, nor can the father's possession be treated as wrongful, so as to justify the claim of the son to remove him from it. The ikrars clearly provided that the father should have the possession and control of the property during his life; and any rights, therefore, which others may have under them to any share of the profits accruing in his lifetime could only be enforced in a suit charging him in the character of manager. The present suit which treats him as a trespasser liable to mesne profits cannot be sustained.

For these reasons their Lordships will humbly advise Her Majesty that the decree of the High Court ought to be reversed, and that of the Principal Sudder Ameen, which dismissed the suit except as to 8 annas share of the mother Noorunnissa's property, affirmed.

The respondents must pay the costs of this appeal.

Digitized by Google

[PRIVY COUNCIL JUDGMENT.]

The 30th January 1875.

Present :

Sir James W. Colvile, Sir Barnes Peacock, and Sir Robert P. Collier.

Hindoo Law—Widow—Reversioners—Limitation—Daughters — Heirship — Disqualification—Admission.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Aumirtolall Bose and others

versus

Rajoneekant Mitter and another.

The Privy Council affirmed the principle of a decision of a Full Bench of the High Court (9 Weekly Reporter, p. 505), which held that, in the case of succession by a reversionary heir after the death of a widow, who takes by inheritance from her husband, and is dispossessed, the period of limitation as against the reversionary heir, in the absence of fraud, is not to be reckoned from the time when he succeeds to the estate; but from the time at which it would have been reckoned against the widow if she had lived and brought the suit.

According to Hindoo law, the right once vested in a daughter by inheritance does not cease until her death, notwithstanding she become barren, or a widow who has not borne a son. Circumstances of that nature do not destroy a heritable right which has once vested. If two sisters, upon the death of their mother, together constitute their father's heir, then upon the death of one of them, the property which descended to both jointly, survives to the other whose right of survivorship previously acquired by inheritance is not destroyed by her disqualification to inherit at that time by reason of her being a childless widow.

An admission of a fact on the pleadings by implication is not an admission for any other purpose than that of the particular issue, and is not tantamount to proof of the fact.

THE respondents were plaintiffs, and the appellants defendants in the Court below.

The plaintiff Rajoneekant Mitter, as the only son of a daughter of Ram Nursing Bose, deceased, sued to recover a four-anna share of certain ancestral estates, and of certain other properties purchased with the income of the said estates. The plaintiff Womeschunder Roy claimed as a purchaser of a portion of the said share from the plaintiff Rajoneekant. His title depends upon that of Rajoneekant.

The ancestral estates originally descended to Ram Nursing and his three brothers from their father Gokool Chunder Bose, and was held by them as an undivided Hindoo family. Ram Nursing Bose died in November 1824, without a son, leaving a widow, Soorjomoneye, and three daughters, Bindubasseenee, Sarodamoye, and Nitokally. Soorjomoneye, the widow, died in March 1835, and upon her death the heirs of Ram Nursing were Sarodamoye and Nitokally, two of the daughters, who were then married and likely to have sons. It may be taken against the plaintiff, upon his own statement, that Bindubaseenee could not take any interest in her father's estate, as she was a childless widow at the time of her mother's death. In his plaint, page 2 of the record, he says :—

"My elder aunt, Bindubaseenee, having become a childless widow, my grandmother supported her and the other two daughters who were both under age, and effected the marriages of the two unmarried daughters in due and proper time. On the 30th Bysack 1242, my maternal great-grandmother breathed her last, leaving behind her my mother and my two maternal younger aunts" (meaning his mother and his maternal younger aunt, Nittokally), "who were under age, and my maternal aunt, Bindubaseenee, under the maintenance and control of my maternal great-uncles."

He then states his own title and eviction as follows :—

"My mother attained her majority in the month of Choitro 1243, and as my youngest maternal aunt unfortunately became a childless widow in the year 1244, so the right of succession to all the aforesaid properties accrued to my mother, according to shasters. I was born in the year 1246; but, owing to my evil fortune, I was at my tender age bereaved of my mother, who breathed her last on the 25th Kartick 1252. Since then I, together with my maternal aunts, remained under the guidance of Joy Doorga Dassy, mother of Prem Chand Bose and Aumirtolall Bose, heirs of my maternal grand-uncle;

* From the judgment of Trevor and L. S. Jackson, JJ., decided on the 31st December 1862.

Digitized by Google

and on their attaining majority, in the same house and in the same mess, and under the superintendence of the said persons, on the 16th Srabun 1262 I attained my majority. When I came to know what property I was entitled to as my grandfather's heir, I proposed separately to realize the collections of the one-fourth share of all the real and personal properties left by my maternal grandfather and grandmother, and mother, and of the real and personal properties, *i. e.*, *talooks*, *&c.*, acquired in own name or *benamee* from the joint funds. Prem Chand Bose, Aumritolall Bose, and Joy Doorga Dassy, the principal defendants, having been instigated by the ill advice of wicked persons, and supported by the defendant Gooroodoss Roy, with the motive of divesting me of my rights, forcibly expelled me from the joint dwelling-house on the 16th Kartick 1264, and having ousted me by artifice, forcibly and fraudulently held possession of all the properties, and are enjoying the profits arising from the estate."

The principal defendants, in answer to the plaintiff's claim, stated (Record, page 6) that Ram Nursingho Bose having no male issue, and having no probability of male issue, executed, in the year 1231, a hibanamah, or deed of gift, to his three brothers, and breathed his last. They then proceed:—

"The aforesaid three donees, by virtue of the said deed of gift, applied to the Courts to be made representatives in the cases that were then pending in the Court in the name of the said Ram Nursingho Bose. An istahurnamah (proclamation) was duly issued from the Adawlut for the appearance of any heir within the period of six weeks. As the maternal grandmother of the Mittre plaintiff was acquainted with the truth and validity of the said deed of gift, no objections on that head were urged by her. The hibanamah was produced in the Court by our predecessors, and testified to by them; and the Judge, considering the said deed to be genuine and proved, ordered, on the 22nd November 1825, the said Ramtunoo and Ramdoyal to be made representatives in the place of the aforesaid Ram Nursingho Bose. The said representatives, agreeably to which, conducted the suits in the Zillah and Sudder Courts, and having retained possession of all the properties specified in the hibanamah, from the date of the said hibanamah, managed the affairs, conducted several suits before the tribunal of different Courts, and even in appeal to the Privy Council."

Three issues were laid down for trial, *viz.*:—

"1. Whether the plaintiff, Rajoneekant, as heir to a part of the paternal and self-acquired properties of Ram Nursingho Bose, his grandfather (the father of his mother), was in possession or not; and whether, on the 16th Kartick 1264, B.S., the defendants dispossessed him by turning him out of doors; and Rajoneekant ought to recover possession with mesne profits or not?

"2. Whether, according to the bill of sale given by Rajoneekant, both the plaintiffs can be entitled to possession of the property in dispute in equal proportions or not?

"3. Whether, according to the deed of gift of Rajonee's maternal grandfather, defendants have been holding possession; and whether such long and continuous possession bars the suit, and it should be dismissed or not?"

The plaint was filed on the 9th September 1858, before the Code of Civil Procedure (Act VIII of 1859), and before the passing of the present Limitation Act, XIV of 1859. The question of limitation must be determined according to the old law.

The defendant's case is that limitation began to run from the time of Ram Nursing's death. The Judge of Jessore held that there was no proof of possession by the plaintiff or by his mother or maternal grandmother.

It has been held by a Full Bench of the High Court at Calcutta, that in the case of succession by a reversionary heir after the death of a widow, who takes by inheritance from her husband, and is dispossessed, the period of limitation as against the reversionary heir, in the absence of fraud, is not to be reckoned from the time when he succeeds to the estate, but from the time at which it would have been reckoned against the widow if she had lived and brought the suit. (See Nobin Chundur Chuckerbutty *v.* Issur Chunder Chuckerbutty, 9 Weekly Reporter, 505.) That rule has been acted upon in other cases, and it appears to their Lordships that the principle of that decision is correct. If in the present case limitation began to run against Soorjomoneye, the widow of Ram Nursing, the plaintiff's suit is barred.

The Judge of Jessore found that there was no proof of possession by Soorjomoneye or by the plaintiff or his mother: and he held that limitation was a bar. Many of the plaintiff's witnesses, however, deposed

Digitized by Google

that Soorjomoneye was in possession. The Judge of Jessore says :—

"What he (referring to the plaintiff) relies on, is the evidence of the witnesses named in the margin, who speak to his possession and ejectment.

1. Mohun Chunder Bose.
2. Chundee Churn Sing.
3. Modoosoodun Bose.
4. Tara Chand Bose.
5. Ram Ruttun Bose.
6. Nilmoney Bose.
7. Krishnokant Chuckerbutty.
8. Shoshee Bhoosun Mullick.
9. Sristydhur Nundy.
10. Issur Chunder Sing.
11. Bungsheebuddun Bose.
12. Ram Chunder Biswas.
13. Krishno Mohun Sing.
14. Ram Narain Mookerjee.
15. Greedhur Chuckerbutty.
16. Dwarkanath Mozoomdar.
17. Gora Chand Shaha.
18. Kassinath Shaha.
19. Soroop Chunder Sing.
20. Sumbhoo Chunder Biswas:

And others, making in all 39 witnesses.

"The evidence of these persons is to the effect that after the death of Ram Nursingho, his widow and daughters, and latterly his daughter's son, were in joint possession with the defendants; that about two years ago the plaintiff, finding that when in joint possession, he was burdened with an unfair share of the expenses, asked for a division of the shares, whereupon the defendants told him that he had no right to anything, abused him, and turned him out of the house. Most of these witnesses are well acquainted with the Bose family and their history. They live near or on the same spot. Some are to all appearance very respectable; nearly all give a connected, and some a full account of the plaintiff's conditional prospects and treatment."

The evidence of the witnesses above referred to is very loose and unsatisfactory; still their Lordships are induced by it to believe that Ram Nursing's widow, Soorjomoneye, continued to live with her deceased husband's brothers and was supported by them out of the income of the estate. Nothing could be more natural or consistent with the usage of Hindoo families than that upon her husband's death she should continue to reside at the family dwelling-house as a member of the joint family. Indeed the principal defendants state in their answer that "they retained their brother's wife, the said Soorjomoneye, and unmarried daughter, under their own support and guidance, and they effected the marriage of the unmarried daughter into a suitable family, and in a proper manner." If the widow and her daughter continued to live as members of the joint family, the presumption would be that they were maintained out of the widow's share, which she inherited from her husband, unless it could be distinctly shown, which it has not been, that she received only maintenance as distinguished from a participation in the profits of the estate, for even if she did not receive her full share of the profits, limitation would not run against her in the same manner as if she had been actually dispossessed of her husband's share of the estate.

As regards her daughters, Sarodamoye and Nittokally, the case would be different. They were married during their mother's lifetime, and would naturally go to the residences of their respective husband and become members of their respective families.

The evidence is not such as to induce their Lordships to believe that either Sarodamoye or Nittokally, upon their mother's death, entered into joint possession of the estate with their father's brothers or their representatives, or that during the lives of their husbands they participated in the profits of the estate. Nittokally, after her husband's decease, may possibly have gone to live with her father's brothers, though it is to be remarked that in the description of her place of residence as a defendant in the suit she is stated to be of "Kattara, Pergunnah Nuldee," which is different from that given of Bindubaseenee. It is unnecessary, however, to come to any conclusion in that respect as regards her. Sarodamoye died before her husband, and there is no sufficient evidence to induce their Lordships to believe that after her marriage she continued with her father's brothers as a member of an undivided Hindoo family.

Their Lordships find that limitation began to run against the plaintiff's mother, Sarodamoye, and that neither she nor the plaintiff ever had possession of any portion of his maternal grandfather's estate or of the rents or income thereof. But the period of limitation must be calculated according to the old law, and consequently the periods during which the plaintiff and his mother were respectively under the disability of minority must be deducted. Deducting those periods, there were only eight years seven months and twenty-four days during which the plaintiff's mother, and three years two months and nine days during which he himself, was not under disability, even calculating the period of the plaintiff's majority at the age of sixteen, and not eighteen. This would give only eleven years nine months and thirty-three days as the period to be taken against the plaintiff in calculating the time which had run against him at the time

Digitized by Google

when his suit was commenced. (See his replication, Record, page 11, line 23.)

The High Court reversed the finding of the Zillah Judge upon the question of limitation, and stated that it had not been insisted upon before them. Their Lordships see no reason for interfering with that decision.

The question remains whether the plaintiff has made out his title; for he must recover (if at all) upon the strength of his own title, and not upon the weakness of that of his adversaries.

The title upon which he relied in his plaint was, that in consequence of his youngest maternal aunt's (*i.e.* Nittokally's) becoming a childless widow after the death of his grandmother and in the lifetime of his mother (Sarodamoye), all the property accrued to his mother, according to the shasters. But that was not so. The right to inherit vested in Nittokally jointly with Sarodamoye, her sister, upon the death of their mother; for at that time she and her sister Sarodamoye were two young married women likely to have sons; and it is clear that, according to the Hindoo law, the right once vested in a daughter by inheritance does not cease until her death, notwithstanding she become barren, or a widow who has not borne a son. Circumstances of that nature do not destroy a heritable right which has once vested.

This at once disposes of the claim of the plaintiff to take as heir to his grandfather any portion of the estate which vested in Nittokally, for she was living when the suit was commenced. It was contended, however, that the plaintiff, as the heir to his grandfather, succeeded upon the death of his mother to one moiety of the four-anna share which descended to his mother and Nittokally, as Nittokally at the time of his mother's death was a childless widow. No proof was given that Nittokally became a childless widow during the lifetime of Sarodamoye, but it was contended on behalf of the plaintiff that the fact was alleged in the plaint and admitted by the answer. The statement in the plaint is—

"That as my youngest maternal aunt unfortunately became a childless widow in the year 1244 (that is, April 1837), so the right of succession to all the properties accrued to my mother, according to the shasters." (Record, page 3, line 1.)

The answer is at page 7, line 39, of the Record, par. 3. It is as follows:—

"From the statement in the plaint, that subsequent to the death of the maternal grandmother of Mitter, plaintiff, and her three daughters lived some in a married state, some in a state of celibacy, and that all the properties left by his maternal grandfather devolved upon his mother, it is evident that this suit has been instituted merely from a malicious and vindictive motive. For agreeably to the Dhurm Shasters and Dayabhaga, though any woman, after obtaining paternal properties, becomes a widow or sterile, yet nothing can bar her right to enjoy the said property during her lifetime; therefore the statement that subsequent to his maternal aunts becoming widows the right and interest to all the properties devolved upon his mother, is utterly false and fallacious."

It appears to their Lordships that there is no admission in the answer tantamount to proof of the fact that Nittokally became a childless widow during the lifetime of the plaintiff's mother, Sarodamoye. There is a denial that Sarodamoye took the whole of her father's estate in consequence of Nittokally's becoming a childless widow; but no admission that at the time of Sarodamoye's death Nittokally was a childless widow, incapable of taking by descent from her father. There is merely an admission by implication in the denial of the legal effect imputed to the fact alleged; and it has been repeatedly held that an admission of a fact on the pleadings by implication is not an admission for any other purpose than that of the particular issue, and is not tantamount to proof of the fact. Edmunds *v.* Groves, 2 Mees. & Wels., 642; Smith *v.* Martin, 9 Mees. & Wels., 304; Robins *v.* Maidstone, 4 Queen's Bench, 815; and it scarcely needs to be remarked that the effect given in our Common Law Courts to admissions on the pleadings has always been greater than that given to admissions in the less technical pleadings in the Courts in India.

Their Lordships, however, would hesitate before determining the case upon the ground that there was no proof that Nittokally became a childless widow in the lifetime of her sister Sarodamoye; for it was assumed throughout the argument before their Lordships that such was the case. They will, therefore, proceed to determine the question upon the assumption that Nittokally was a childless widow at the time of Sarodamoye's death.

The question then resolves itself into this: had Sarodamoye an interest in the estate distinct from that of Nittokally, which upon her death descended to the then heirs of her

Digitized by Google

father ; or did she and her sister Nittokally take a joint estate by descent, which after Sarodamoye's death survived to her sister Nittokally ? If the former was the case, then Nittokally having, during the lifetime of Sarodamoye, become disqualified as a childless widow to take by descent from her father, the plaintiff, as the son of Sarodamoye, was the next heir to her father, and upon his mother's death would have taken as reversionary heir to his grandfather the interest which had descended to his mother, and which upon her death would have descended to Nittokally as reversionary heir to her father if she had not at that time been disqualified ; but if Sarodamoye and her sister Nittokally, upon the death of their mother, together constituted their father's heir, then upon the death of Sarodamoye the property which descended to the two sisters jointly survived to Nittokally, and her disqualification to inherit at that time did not destroy the right of survivorship which she had previously acquired by inheritance.

There is a great analogy between the case of widows and that of daughters taking by inheritance, though the pretension of daughters is inferior to that of widows.*

In the case of widows, it has been held by the Judicial Committee (see Bhugwandeen Doobey *v.* Myna Baee, 11 Moore's Indian Appeals, 487†) that the estate of two widows, who take their husband's property by inheritance, is one estate. "The right of survivorship," it is there said, "is so strong, that the survivor takes the whole property, to the exclusion even of daughters of the deceased widow."

In the case of Srimuttu Muttu Vezia Raguna de Runi *v.* Dora-singay Tevan, 6 Madras High Court Reports, 310, it was held that daughters, to whom as a class paternal property descends, take a joint interest, with rights of survivorship.

The former case had reference to property in Benares, and the latter to property in Southern India.

In the case of Boidya Nath Sett *v.* Durga Churn Basak, High Court of Bengal, Original Jurisdiction, decided on 28th February 1865, it was held by Mr. Justice Morgan, after consulting Mr. Justice Shumbhoonath Pundit, a learned Hindoo lawyer, that in a case where two daughters succeeded, by inheritance, to their father's estate, and one of them died leaving her sister who had then become a childless widow, the property survived to her sister ; because, like widows, the two daughters collectively were, in a legal sense, one heir to their father,—Vyavastha Darpana, by Shamachurn Sircar (octavo ed., p. 170). Their Lordships are of opinion that the last mentioned decision was correct, and that upon principle, as well as upon authority, the estates, upon the death of Sarodamoye, survived to Nittokally, though she would, at that time, have been incompetent to take by inheritance from her father.

The High Court express no opinion upon that point ; they seemed, however, to assume that the plaintiff acquired no right by inheritance during the lives of his aunts ; but they decided in favor of the plaintiff, upon the strength of a petition said to have been presented to the Court by Bindubaseenee and Nittokally,. who were made defendants in the suit.

In the Index to the Record, the petition is described as "the petition of Bindubaseenee, filed on the 16th April 1859," which was more than six months after the filing of the plaint. The petition forms no part of the Record transmitted to Her Majesty in Council ; for in a note to the Index it is stated that the paper cannot be traced. An abstract of the petition is set out in the decree of the Zillah Judge, page 479. It is as follows :—

"*Abstract of the petition of Bindubaseenee Dassee and others.*

"On the 16th April of the current year, that is, 1859, the said Dassee and Nittokally Dassee, two defendants, filed a petition, stating that they have no objection against the suit of the plaintiff ; that their father, Ram Nursingha Bose's rights continued in the plaintiff, Rajoneekant, as the real heir; that their father did not execute any hibbanamah ; and that they agreed in the said suit of the plaintiff, &c."

The Zillah Judge, speaking of this petition, says :—"I set no value on a petition said to have been filed by these women" (referring to Bindubaseenee and Nittokally), "consenting to the plaintiff's suit. We cannot be certain who filed the petition, and women in this country may be easily induced to lend their names to anything."

With reference to this part of the case, the High Court says :—

"But another objection is taken to the suit, namely, that as plaintiff's maternal aunts, Bindubaseenee and Nittokally, childless widows, are still living, and the plaintiff's

* Dayabagha, cap. 11, s. 2, par. 30, p. 193, quarto edition.

† 9 W. R., P. C., 23.

Digitized by Google

right to succeed is contingent on his surviving them, his suit is at any rate premature.

"These two ladies have filed in the record of this case a petition, in which they acknowledge the plaintiff to be the rightful heir, disclaim any right of their own, and assent entirely to the suit.

"The Judge, gratuitously as it seems to us, declares that he sets no value on this petition. He says, 'we cannot be certain who filed the petition, and women in this country may be easily induced to lend their names to anything.'

"We can find no reason for these observations. The petition appears to have been filed in the usual way, through a pleader duly authorized; it is not suggested that the women had anywhere repudiated it, and we think it must be allowed the fullest legal effect of which it is capable.

"But, we are asked, what is its effect? Females are not at liberty to do or assent to acts which may have the effect of changing the course of succession, and these two ladies, the respondents contend, cannot combine to give the inheritance in this case to a person who might eventually not be the legal heir.

"We consider this objection untenable; a Hindoo widow, it has been ruled, is competent to alienate, with the consent of the next heirs, an estate of which she is in possession under a life interest; she has also been permitted to convey the estate to the next heir himself.

"It is admitted that, by retiring from the world, or becoming byragees, they might immediately cause the succession to devolve on the plaintiff; and we think that when the plaintiff raises a particular question of title with the defendants, which clearly his aunts would be first entitled to raise, and he next after them, and where they expressly give up their right in his favor and assent to his suit, the defendants cannot be permitted to object that plaintiff is debarred from suing until they are, by the course of nature, out of the way.

"We see, therefore, no difficulty in the way of a decision of this suit as at present constituted."

It appears to their Lordships that the Judges of the High Court have given a greater effect to this petition than that to which it is entitled.

Admitting, for the sake of argument, that the petition having been filed in the suit might, without proof of the execution of a vakalutnamah by these ladies, or of any authority to file it, be used against the defendants Bindubaseenee and Nittokally as an admission by them in the suit that the plaintiff was the real heir, and that they had no defence to the suit, it appears to their Lordships that that is the greatest effect that could be given to the document. The petition did not amount to a conveyance or to a disclaimer of title, but merely to an admission made more than six months after the commencement of the suit, that the plaintiff was the real heir, and that they had no defence to offer. It is clear that an admission, or even a confession of judgment, by one of several defendants in a suit, is no evidence against another defendant. Suppose Nittokally, the real heir, had been barred by limitation, she could not by her admission, contrary to the fact, that the plaintiff was the real heir, have bound the other defendants, and thus have entitled the plaintiff, upon a question of limitation, to a deduction of the period of his minority, to which she would not have been entitled herself.

But there was, in fact, no evidence of any authority to file the petition. If a vakeel professing to act for Nittokally had filed a deed purporting to have been executed by her before the commencement of the suit conveying the estate to the plaintiff, it would not have been evidence against the other defendants without further proof.

The decision of their Lordships upon the first issue having disposed of the present suit, it is perhaps unnecessary for them to express an opinion upon the third issue. They think it right, however, to add that they agree with the High Court in the conclusion at which they have arrived, *viz.*, that in the present suit the defendants have wholly failed to establish the hibba on which they rely as the foundation of their title.

Their Lordships are of opinion that the plaintiff had no right to inherit any portion of the estate during the life of Nittokally, and that the petition did not vest any such right in him. His suit ought therefore to be dismissed, and dismissed against all the defendants, including Bindubaseenee and Nittokally, notwithstanding the petition. Such a petition confessing the suit cannot be admitted as warranting a judgment against them, when upon an investigation it appears that the plaintiff was not the real heir; nor could it justify a decree against them for possession and mesne profits, when there was no allegation in the plaint, nor any evidence in the cause, that they had dispossessed him. The only charge of dispossession was against

Digitized by Google

the principal defendants, Prem Chund Bose, Aumirtolall, and Joy Doorga Dassee. Their Lordships will, therefore, humbly advise Her Majesty that the decision of the High Court be reversed, except so far as it reverses the judgment of the Zillah Judge, and that the suit be dismissed.

Considering that a great part of the costs has been incurred in consequence of the issues upon which the defendants have failed, and that it was necessary for the plaintiff to get rid of the decision of the Zillah Judge, their Lordships think it right to order that the parties respectively do bear their own costs in both the Lower Courts and of this appeal.

The Judges of the High Court expressly declared by their decree that it was "to be known that from the death of Nittokally any dispute concerning the inheritance by other parties was not determined by their decision." Their Lordships think it right to add that they do not decide any question between Nittokally or Bindubaseenee and the other defendants, but merely the questions raised in the suit as to the rights of the plaintiff at the time when the suit was instituted.

The 8th January 1875.

Present:

The Hon'ble W. Markby, *Judge.*

Privy Council Appeal—Act VI of 1874 *ss. 5 and* 11*—Limitation.*

In the Matter of

Funeendro Deb Roy Kut (Appellant to England) *Petitioner,*

versus

Jogendro Deb (Respondent to England) *Opposite Party.*

Baboo Chunder Madhub Ghose for Petitioner.

Mr. R. T. Allan and *Baboo Amarendro Nath Chatterjee* for Opposite Party.

An intending appellant to the Privy Council, who held a certificate under Act VI of 1874, s. 5, having failed to give the requisite security and deposit within the six weeks prescribed by s. 11, an order was passed to strike off his application to appeal. As, however, the defendant in the Court below, who would have been respondent in the appeal, had filed an appeal under the Letters Patent, s. 15, against the grant of the certificate, the applicant contended that the six weeks would not begin to run until such appeal was finally disposed off.

HELD that there was no ground for this contention, as the appeal did not operate as a stay of proceedings, nor remove the record to any other Court.

HELD, that the Court had no jurisdiction to enlarge the time specified in s. 11.

IN this case the judgment of this Court, against which the applicant is desirous to appeal, is dated 6th February 1874. On the 1st August 1874, he presented a petition under Act VI of 1874, praying for a certificate that the case fulfils the requirements of Section 5 of that Act. On the 28th August a certificate was given, and under Section 11 of the Act it was the duty of the appellant, within six weeks of that date at the latest, to give security for the costs of the respondents, and to deposit the amount required to defray the expenses of preparing and transmitting the record to the Privy Council.

On the 9th October, being the last day of the six weeks, the applicant presented himself before the Deputy Registrar of this Court, with a receipt signed by the Registrar of Deeds for Calcutta for a document which had been deposited for registration, and which the applicant says was the security bond which he had taken to have registered. The Deputy Registrar refused to receive the receipt without the orders of the Court. No money was tendered on that day for the expenses of preparing the record as required by the Section. On the 27th November the case was set down in the list, according to the usual practice, for the orders of the Court, the applicant not having complied with the requirements of the Act. Copies of the list had been posted in the usual places about the Court. On that day no one appeared, and accordingly an order was made to strike the case off the file: that at least was the obvious intention of the order. The words used are "strike off the appeal." But as no appeal had been admitted, what was obviously meant was to strike off the application to admit the appeal, which application was then pending. Subsequently, on the 4th December, an application was made for an order that the appeal should be restored. This application was accompanied by an affidavit by one Haree Mohun Dass, stating that he was the manager for the applicant; that the applicant had no money of his own to carry on the appeal, and that he, the deponent, had been unable to raise the money before Friday last,— namely, the day on which the case was brought before the Court, on which day the money was tendered, but was refused, as my order for striking off the case had already been made.

Digitized by Google

There is also an affidavit of the same date by Aughore Nath Chatterjee, which only reiterates facts already stated. The applicant himself has made no affidavit. The proper officer has certified that the security bond was tendered on the 27th of November, but was also refused for the same reason,—namely, that the case had been struck off.

Upon these petitions being put in, I ordered the application to be renewed in the presence of the opposite party. Upon the case coming on, I pointed out that the form of the application was erroneous, the error having probably arisen from the incorrect wording of my previous order of the 27th November. Thereupon it was agreed that this application should be treated as an application to direct the officer to receive the security and the amount tendered, and to proceed with the preparation of the appeal. Thus the first question to be considered is, whether the six weeks mentioned in Section 11 had expired when the money and the security bond were tendered. The reason why it is said not to have done so is this. My certificate was granted, as I have said, on the 28th of August, and the six weeks from that date expires on the 9th October; but on the 8th September the defendant in the Court below, who would have been respondent on the appeal if it had been admitted, filed an appeal against that order under Section 15 of the Letters Patent, and the applicant contends that the six weeks from the grant of the certificate will not begin to run until the appeal under Section 15 in this Court is finally disposed of. I do not see what ground there is for that contention. The appeal from my order does not operate as a stay of proceedings, nor does it remove the record to any other Court; and it is clear that the applicant is fully aware of this; for he has since attempted on more than one occasion to proceed in his appeal to the Privy Council, and indeed is at this very moment attempting to do so.

It seems to me, therefore, that the applicant has not complied with the requirements of Section 11, and that he cannot comply with them unless the Court has a discretion to enlarge the time specified in the Section, and does so. The words of the Section are, however, imperative, and there is nothing to indicate that any discretion is given. Whilst the rule requiring security to be put in within a certain time was only a rule of this Court, I considered that there was necessarily a discretion in the Court itself to enlarge the time. But this is now a rule laid by the Legislature, and must be construed like any other provision in a Statute.

I feel also bound to say that I do not consider it necessary that the Court should have any such discretion. It seems to me that the time given by the Act, which is six months at the least (in this case the applicant has contrived to make it six months and six weeks) is amply sufficient to get the security bond executed, registered, and returned, and to raise the money if due diligence be used. That diligence is, I regret to say, very rarely met with. In a very large majority of cases, as in this case, the parties wait until the very last day of the period allowed by law for taking each successive step in the transaction; and upon the whole, I think it better for the interests of justice that this Court should not have any discretion to enlarge the time. There is nothing, therefore, which appears to me to render it in any way necessary that I should depart from the literal construction of the Section which, strictly taken, does not leave any discretion to this Court.

I may add that even had I considered that this was a matter for the discretion of the Court, I find it very difficult to see upon what grounds the appellant can ask that the time should be extended. As regards the security bond, no reason has been shown why it was not ready earlier, or why nothing was done between the 9th October and the 27th November. The petition contains a statement which leaves it to be inferred that the Court was closed during that period. But that was not so. The Court and the office were both open during the whole vacation except for the twelve days of the Doorga Pooja festival, but even on those days very urgent applications could have been made. As the applicant has not been without advice in the matter, this must have been well known to him. With regard also to the deposit of the money, the bare statement of the applicant's manager that the applicant could not succeed in raising the money earlier, is a very slender reason for enlarging the time. I should fear that if such an excuse were once admitted, applications to enlarge the time would become very frequent.

Upon these grounds, therefore, it seems to me that the application that this bond should be received and the money deposited must be refused.

My order of the 27th November, that the application to admit the appeal be struck off the file, will stand.

Digitized by Google

The 21st January 1875.

Present :

The Hon'ble Louis S. Jackson and W. F. McDonell. *Judges.*

Prosecution by Municipality—Act III (B.C.) of 1864 s. 67—Action for Damages.

Reference to the High Court by the Judge of the Small Cause Court at Howrah, dated the 14th August 1874.

Motee Lall Bose, *Plaintiff,*

versus

The Howrah Municipality, *Defendant.*

Baboo Umbika Churn Bose for Plaintiff.

Baboo Juggadanund Mookerjee for Defendant.

The Howrah Municipality prosecuted plaintiff under Act III (B.C.) of 1864, s. 67, and bye-laws, and procured the infliction upon him of a fine which was realized by attachment and sale of moveable property. Plaintiff then brought a suit against the Corporation for the value of the goods sold and damages:

HELD, that the suit was not maintainable against the Municipal Corporation.

Case.—THIS is a suit instituted by the plaintiff to recover from the defendant the sum of Rs. 386-5-3 as the value of certain pieces of sundry wood, alleged to have been wrongfully attached and sold by the defendant, together with the damages sustained by him owing to the suspension of his trade for a month, the time when his golah or depôt was held under attachment for the recovery of a debt which was not his own.

The Municipality having found a piece of land at Kala Beebee's bagan, Ramkristopore, to have been covered with jungle and night soil, prosecuted the plaintiff as agent of ten annas zemindar under the provisions of Section 67, Act III (B.C.) of 1864, and bye-laws, whereupon a fine of Rs. 20 was imposed upon the plaintiff on 30th June 1873.

This fine, not being duly paid in, a warrant was ordered to be issued for the recovery of the amount on the 3rd of July 1873, in pursuance to which the inspector of the Shibpore Police, under a Notice Warrant No. 1, dated 31st of March 1874, attached the plaintiff's wood depôt, consisting of the following articles :—

Sundry wood planks	...	104	pieces.
Do. do. posts	...	204	do.
Do. do. square planks		15	do.

for the recovery of Rs. 30, namely, Rs. 20 as above stated, and Rs. 10 as fine imposed on the plaintiff individually on 4th June 1873, for not removing straw, after he was ordered to do so, from his golah, which he had newly used as a depôt for straw without a license.

The plaintiff paid off this latter fine (Rs. 10) on 12th April 1874, but objected by two petitions, dated 24th March 1874 and 10th April 1874, respectively, to the other fine (Rs. 20) being realized from him, inasmuch as the land in respect to which that fine was imposed was not his own, but belonged to his master Poorno Chunder Roy Chowdhry and his co-sharers. The Municipality however rejected these petitions.

The defendant afterwards caused 50 pieces of the sundry wood to be taken from the plaintiff's golah, of which 28 pieces have been sold off for the recovery of the fine (Rs. 20) and the 22 pieces returned to plaintiff.

The plaintiff urges that he is simply an agent, *i.e.*, mookhteer of Poorno Chunder Roy Chowdhry, zemindar, and as such he was not personally liable for the fine imposed upon him on account of the jungles on the land of his master, and that the Municipality was wrong in attaching his own golah and selling off his own property to realize that fine: hence the suit against the Corporation.

The following pleas have been urged by the Municipality :

1*st.*—Non-liability.

2*nd.*—That no notice was served upon the Commissioners, and therefore the suit must fail under Section 87 of Act III (B.C.) of 1864.

3*rd.*—That the fine having been imposed by a Municipal Commissioner in the exercise of his functions as Magistrate, and the same having been realized as judicial fine, no action would lie against the Corporation.

4*th.*—That the Municipal Corporation was quite competent to commence a prosecution against any one for offences committed under the Municipal Act, and no suit would lie

Digitized by Google

against the Corporation for prosecuting the plaintiff.

5th.—That the damages claimed are excessive and remote.

Having thus far stated the case, I would proceed now to respectfully submit the following questions, arising in the adjudication of the 3rd and 4th pleas, for the decision of the Hon'ble Judges of the High Court, *viz.*:—

1st.—Whether the Municipality, as a body Corporate, could be made liable to the plaintiff for anything done by one of its Commissioners in the exercise of judicial functions?

2nd.—Whether the fact of the Municipality having derived a benefit by effecting the sale of the plaintiff's property for the recovery of the fine would make the Corporation liable to the plaintiff?

As regards the first question, my humble opinion is that the act of one of the Municipal Commissioners in the exercise of the functions of a Magistrate, could not entail any liability upon the Corporation.

The fine in question has been realized from the plaintiff under the provisions of Section 80 of Act III (B.C.) of 1864 and Section 307 of the Criminal Procedure Code (Act X of 1872), so that it was the business of the plaintiff to have preferred a claim before the Magistrate after the property was attached by the Police, and the Magistrate was the only officer competent to determine the same under the Section last quoted. Again Sections 42 and 43 of the Police Act, No. V of 1861, protect the Police officer who had distrained the property, so far as the attachment itself is concerned. On the whole, I can see no law by which the plaintiff could come against the Corporation for obtaining the damages alleged to have been sustained by him.

In expressing my views in respect to the second question, I would beg leave respectfully to state that the Municipality is not responsible for any judicial act done by any of its Commissioners, in the same way as the Government is not liable for any act of its judicial officers, irrespective of any benefit that the former might derive from the actions of the latter.

In this view of the law I have ruled that the suit is not sustainable against the Municipality, and have accordingly dismissed it with costs, contingent upon the opinion of the Honourable High Court.

Judgment of the High Court.

Jackson, J.—We think it clear upon the facts set out in this statement that the suit is not maintainable against the Municipal Corporation. We certify our opinion accordingly to the Small Cause Court. The defendants will be entitled to two gold mohurs as costs here.

The 21st January 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Jurisdiction—Zemindaree Business—Act XI of 1865 s. 11.

Reference to the High Court by the Subordinate Judge of Dacca, dated the 21st November 1874.

Anonymous.

Following the decision in 19 W. R., p. 341, it was held that zemindaree business is not business of the kind contemplated by Act XI of 1865, s. 1.

Case.—UNDER Section 28, Act XXIII of 1861, I have the honor to lay for orders and decision of the Hon'ble Court the following points:—

The point which I am called upon to state for reference is, whether a claim for mesne profits against the defendant who has his zemindaree cutchery house within the local jurisdiction of the Dacca Small Cause Court, and has his amlahs for his business, is cognizable by the Moonsiff.

It has been settled by a decision in the Weekly Reporter, Volume XIX, page 341, that the claim for mesne profits is determinable by the Court of Small Causes, and there is no dispute on this point in the present case. It is admitted that the Small Cause Court, if not otherwise ousted of its jurisdiction, is competent to try a claim of this kind. The contention raised before me principally is, that the defendant does not reside within the local jurisdiction of the Small

Digitized by Google

Cause Court, and as wrongful act of dispossession which gave plaintiff cause of action did not arise out of the discharge of business of the zemindaree, the management of which is conducted by his amlahs, the Moonsiff, and not the Judge of the Small Cause Court of Dacca, was competent to try the suit.

Here the facts as appear from the plaint are as follows :—

The plaintiffs held one Khadda Lakheraj Cherogee land, their ancestral property, in Kismut Khizerpore, and were dispossessed by Sovandad Khan, the zemindar of the village. Soon after they brought a possessory suit under Section 15 Act XIV of 1859, and succeeded to recover possession. The present claim, laid at Rs. 328, is for mesne profits accruing during the time of dispossession.

The defendant having entered appearance states, among other grounds, that the portion of the disputed land was in the jote of his tenants, who paid a yearly rent, Rs. 6-8, to his gomastah ; that his zemindaree amlahs received the mangoe and fruits of other trees situated on the disputed land as presents from the tenants. The defendant further states that his zemindaree amlahs have cut and taken only a very small number of bamboos from the disputed land for the erection or repair of his cutchery house. The line of defence is but to dispute the amount of claim. The Moonsiff has found that the Small Cause Court cannot be ousted of its jurisdiction, inasmuch as the defendant has his cutchery house and also his servants for business. It is to be observed that the plaintiff first presented the plaint in the Small Cause Court at Dacca, but Mr. Thompson, the late Judge of the Court, referring to a decision in the Weekly Reporter, Volume XIX, page 341, returned it ; being of opinion that the claim against the defendant, who is not a resident of Dacca, is determinable by the ordinary Civil Court.

I accept the view of the Moonsiff. The facts of the case in the Weekly Reporter, Volume XIX, alluded to above, differ materially from that of the present suit. The defendant has a cutchery house in the village where the land, the mesne profit of which is the subject-matter of the suit, is situated. The words "business and servant" as in Section 8, Act XI of 1865, must also mean and include zemindaree business, and the amlah employed for the business of the zemindaree.

The defendant, as zemindar of the village, had dispossessed the plaintiff and continued to realize the rent of it by his servants employed for the business of the zemindaree. The act of the defendant's servants in realizing the rent of the land and crediting it in the village paper relates to the business of the zemindaree for the discharge of which they are employed by him.

I may refer to a decision in the Bengal Law Reporter, Volume II, page 227,* which has not though direct bearing on the case, but it will at least show that a zemindar cannot, even in a case of trespass, plead to exonerate himself from the consequences of the acts of his servants employed for the management of his zemindaree ; that such act has no relation to the business of the zemindaree for which they are employed. A claim for mesne profits arise out of a wrongful act of dispossession, and as the defendant states to have held by his zemindaree amlahs the collection of rent of plaintiff's land, his amlahs must come within the meaning of servants, and his collection of rent of plaintiff's land within the meaning of business as contemplated in Section 8 of the Small Cause Court Act. I am of opinion, therefore, that the Small Cause Court is not ousted of its jurisdiction, and that the present appeal should be dismissed with costs.

As no special or second appeal lies from my order in the Small Cause Class case below Rs. 500, the plaintiff, appellant, has moved for a reference on the points in which I also entertain a reasonable doubt, and I would pass my order contingent on the decision of the Honourable High Court.

The judgment of the High Court was delivered as follows by :—

Jackson, J.—In this case we are of opinion, in accordance with the decision in XIX Weekly Reporter, page 341, that the Judge of the Small Cause Court at Dacca rightly held that his Court had no jurisdiction to entertain the suit, and that the suit ought to have been tried on the merits by the Moonsiff. It is clear that the defendant did not, at the time of the commencement of the suit, dwell or personally work for gain or carry on business within the limits of the jurisdiction of the Small Cause Court, and the learned Chief Justice laid down in the case cited that zemindaree business is not business of the kind contemplated by Section 8 Act XI of 1865, so as to bring the case within the third clause of that Section, in which ruling we concur.

* 11 W. R., 101.

Digitized by Google

The 22nd January 1875.

Present :

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Certificate under Act VIII of 1859 *s.* 286—*Limitation.*

Case No. 403 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Shahabad, dated the 24th July 1874.

Buboria Ahun Basee Kooer (Decree-holder) *Appellant,*

versus

Joobraj Singh (Judgment-debtor) *Respondent.*

Mr. M. L. Sandel and *Baboo Abinash Chunder Banerjee* for Appellant.

Baboos Kalee Prosunno Dutt and *Chunder Madhub Ghose* for Respondent.

A certificate having been given to a decree-holder by a District Court for possession and mesne profits of properties situated in another district, he obtained possession, but delayed filing certain papers in connection with the question of mesne profits, and the case was struck off. The result of an appeal to the Privy Council being in his favor, he applied within three years of the Privy Council's decree to complete the execution. The Judge upon this refused to proceed without a fresh certificate, on the ground that eleven years had elapsed from the date on which the case was struck off :

HELD, that the decree-holder was entitled to have the mesne profits ascertained without a fresh certificate.

Kemp, J.—THE decree-holder is the appellant in this case. It is necessary to mention a few facts material to the decision of the case. The decree was obtained in the Gya Court. The properties in suit are situated in that district as well as in the district of Shahabad. The Gya Court was empowered to try the suit under the orders of the late Sudder Court. The High Court decision, which upheld the Zillah Court's decree, is dated the 27th of August 1862. It appears that the decree-holder took out execution in the Gya Court, and obtained from that Court a certificate with reference to the properties situated in the Shahabad Court. Subsequently there was an appeal on the part of the judgment-debtor to the Privy Council, and the final decision of the Privy Council is dated the 28th of July 1871. The present application to the Shahabad Court on the part of the decree-holder is made on the 29th of May 1874, or within three years from the final decision of the case by the Privy Council. The purport of the certificate which was granted by the Gya Court in November 1862 was that the Shahabad Court was to give the decree-holder possession of the properties situated in that district, and to ascertain and realize the mesne profits awarded by the decree. Possession, it is admitted, has been obtained by the decree-holder, and the present application of the 29th of May 1874 is with reference to the wassilat alone. It will be necessary now to go back to the proceeding of the Shahabad Court of the 30th of April 1863. The Court's proceeding of that date recites the fact that possession had been given to the decree-holder, and that an Ameen had been ordered to ascertain the mesne profits ; that the Ameen had reported that the mesne profits amounted to Rs. 11,899-12 from 1264 to 1269 Fuslee, and that in the opinion of the Ameen, in which opinion the Judge concurred, the Government revenue ought to be deducted from that sum. The decree-holder was accordingly called upon to file the mouzawaree papers from the Collectorate to enable the Court to make the deduction. The decree-holder having failed to do so, the case was struck off the file. We are now told that the decree-holder, anticipating that the decree of the Privy Council might possibly be adverse to him, thought it prudent not to execute his decree until the decision of that Court was known. With the present application, which, as already observed, is in time from the date of the decision of the Privy Council, he offered to supply the mouzawaree papers called for in 1863, in order that the amount of wassilat might be ascertained. The Judge has refused to comply with this prayer on the ground that as eleven years have elapsed from the date on which the case was struck off on the 30th of April 1863, the decree-holder must obtain a fresh certificate from the Gya Court. Against this order the present appeal is made. We think it clear that, under the

Digitized by Google

original certificate, the decree-holder was entitled to possession of the property situated in the District of Shahabad and to ascertainment of the mesne profits; and the certificate goes on further and says that the mesne profits are to be ascertained and realized. The Judge, in his present order, has not only refused to realize the mesne profits, but even to ascertain the amount of those mesne profits without a fresh certificate. We think the decree-holder is entitled to have the mesne profits ascertained under the provisions of this certificate.

We remand the case with directions to the Shahabad Judge to ascertain these mesne profits, and any further execution in respect of these mesne profits can be obtained without any fresh certificate from the Gya Court.

Each party to pay their own costs of this appeal.

The 23rd January 1875.

Present:

The Hon'ble F. B. Kemp and Romesh Chunder Mitter, *Judges*.

Execution—Miscellaneous Appeal—Combination of Wrong-doers—Liability for Mesne Profits.

Case No. 212 of 1874.

Miscellaneous Appeal from orders passed by the Officiating Judge of Sylhet, dated the 23rd and 27th April 1874, *affirming orders of the Subordinate Judge of that district, dated the 8th and 9th August* 1873.

Ram Chunder Surmah and others (Judgment-debtors) *Appellants*,

versus

Ram Chunder Pal and another (Decree-holders) *Respondents*.

Mr. Branson and *Baboos Lullit Chunder Sen* and *Tarucknath Dutt* for Appellants.

Baboo Jay Gobind Shome for Respondents.

While a decree of the High Court was in course of execution, certain of the judgment-debtors objected, in a miscellaneous appeal, that the decree was not operative against them, because they had not been served with notice. The objection was overruled on the ground that if the objectors had wished to take the benefit of this argument, they ought to have applied for a review of judgment.

Where intermediate holders combine wrongfully to keep an auction-purchaser out of possession, they must all be held liable for mesne profits.

Kemp, J.—THREE points have been taken in this case; 1st, that inasmuch as in the review case which terminated in the decree of this Court which is now under execution, dated the 27th April 1872, thirty parties only were served with notice, therefore the decree of the Court of that date is operative only as against those thirty parties and not as against the other defendants in the case. The Judge is carrying out the decree of this Court passed on the 27th April 1872. Now it is clear from that decree that this Court restored the decree of the first Court as against all the defendants who did not appeal to the Zillah Judge, and all the appellants before us come within that category, namely, parties who did not appeal to the Zillah Judge. If, therefore, the appellants before us wished to take the benefit of the argument now raised that because they were not served with notice the decree of this Court is not operative as against them, they ought to have applied for a review of judgment. The Judge has put a proper construction on our decree and we therefore overrule the first ground.

On the second ground, it is admitted by the learned Counsel who appears for the appellants that taking the question as a naked question of law all wrong-doers must be held liable who have combined together to turn another party out of possession. In this case the party turned out is the auction-purchaser, and the Court found that all the defendants combined together to keep him wrongfully out of possession. Some cases have been alluded to in which this Court has taken an equitable view of the liabilities of respective wrong-doers and has apportioned the liability for mesne profits in proportion to the extent of the property respectively held by them, but those cases do not apply to the present one in which a body of intermediate holders have combined together wrongfully to keep an auction-purchaser out of possession.

The last objection embodied in the 6th ground of appeal was not raised before the

Digitized by Google

Judge in the Court below and cannot now be taken in this Court.

The appeal must be dismissed with costs. Pleader's fees 5 gold mohurs.

The 25th January 1875.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble E. G. Birch, *Judge*.

Rent Suit—Title—Act VIII (B.C.) of 1869 *s.* 102.

Case No. 751 of 1874.

Special Appeal from a decision passed by the Judge of Rungpore, dated the 23rd December 1873, *modifying a decision of the Moonsiff of Bhotmaree, dated the 23rd June* 1873.

Kashee Ram Doss (Defendant) *Appellant*,

versus

Maharanee Sham Mohinee (Plaintiff) *Respondent.*

Baboos Tarucknath Dutt and *Bungshee Dhur Sen* for Appellant.

Baboos Sreenath Doss and *Gopal Lall Mitter* for Respondent.

Following the ruling in 21 W. R., p. 86, it was held that in a suit for rent in which the defendant (ryot) sets up the title of a third person who is not made a party, the decision cannot be considered to be a binding decision in respect of title as between parties having conflicting claims within the meaning of Act VIII (B.C.) of 1869 s. 102.

Couch, C.J.—The decision of Mr. Justice Ainslie* is one which we ought to follow. The case is this;—the plaintiff claims an eight annas share of the rent of the land held by the defendant, the ryot. There had been a suit between the plaintiff and another person in which there was an appeal to Her Majesty in Council, and the plaintiff in that suit, who is also the plaintiff in this, sought to establish a right to the 8 annas share of the whole. It was decided by the Judicial Committee that the plaintiff was not entitled to that, but to an 8 annas share of a 10 annas and odd share, that is, to a 5 annas and 2 kags share.

The defendant in that suit who had thus obtained a decree in his favor applied to be allowed to intervene in the present suit. The application was refused, and the suit proceeded between the plaintiff and the ryot defendant. Under such circumstances, we think, as Mr. Justice Ainslie says in the case which was quoted from the Weekly Reporter, Volume XXI, page 36, that there is no determination of title as between parties having conflicting claims. The person who has a conflicting claim was not allowed to be a party to the suit, which has been decided as between the plaintiff and the ryot.

The only difficulty that might be suggested is what will be the position of the ryot if the person who was not allowed to intervene should afterwards sue for his share of the rent according to the decision of the Judicial Committee. The ryot may be sued by him and be called upon to pay what he has been ordered to pay by the decree in this suit. We think the answer to this is, that if the ryot should be so sued, he ought to ask to have the present plaintiff made a party to the suit, so that he should defend it in respect of the portion of the rent to which there would be a conflicting claim; and if the plaintiff should appear to be entitled to a decree, it ought to be against the plaintiff, and not against the ryot, who would thus be protected. So that, in effect, there is not a decision on a question of title as between parties having conflicting claims. The decree in this suit directs that the ryot shall pay his rent as it has been found he has been doing for more than twelve years. We do not think it is a case which comes within Section 102 of Act VIII of 1869 B.C. That is the view which Mr. Justice Ainslie took. As it is not a case in which a special appeal lies, the appeal will be dismissed with costs.

---

* Weekly Reporter, XI, page 36.

Digitized by Google

The 26th January 1875.

Present:

The Hon'ble E. G. Birch, *Judge.*

Farm—Preservation of Rights.

Case No. 1223 of 1874.

Special Appeal from a decision passed by the Additional Judge of Furreedpore, dated the 8th May 1874, *reversing a decision of the Moonsiff of Mucksoodpore, dated the 23rd June* 1873.

Doorga Churn Chatterjee (Plaintiff) *Appellant,*

versus

Goluck Chunder Biswas and another (Defendants) *Respondents.*

Baboo Doorga Mohun Doss for Appellant.

Baboo Bhoobun Mohun Doss for Respondents.

Where a farm is given with a reservation of the right to sue for enhancement of rent, the farmer, and not the zemindar, is the person to issue notices and sue thereon.

It appears that the plaintiff had given a farm of the estate, within which the defendant's land lies, for five years to another party, reserving to himself the right to sue to enhance the rents. The Moonsiff was of opinion that under this reservation contained in the lease, the zemindar, and not the farmer, was the person to issue notices of enhancement and to sue thereon.

Upon the case coming before the Judge on appeal, he, following the decision of this Court to be found in III Weekly Reporter, Act X Rulings, page 157, the circumstances of which case appear clearly to resemble the present case, finds that the farmer was the person entitled to issue notices of enhancement, and not the zemindar. This finding of the Judge appears to be perfectly correct in law.

The special appeal is dismissed with costs.

The 27th January 1875.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble E. G. Birch, *Judge.*

Imperfect Decree—Execution.

Case No. 91 of 1874.

Regular Appeal from a decision passed by the Assistant Commissioner of Goalparah, dated the 13th February 1874.

Kalee Narain Singh Burooa (Plaintiff) *Appellant,*

versus

Chunder Narain Bukshee and others (Defendants) *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Gopaul Lall Mitter for Respondents.

Where the final decree upon a suit for possession declared that the defendant had a right of occupancy on payment of a proper rent, and was liable for rent from the date of suit, without defining the rate of rent:

Held, that the decree was imperfect and that the rent could not be ascertained in execution, and that another suit was necessary for the determination of the proper rent, *i.e.*, to carry out the decree.

Couch, C.J.—The plaint in this case is drawn, as so many plaints are, in a very improper manner with reference to the cause of suit, but this Court cannot allow a plaintiff to be defeated in his suit on account of the improper form of the plaint, if, looking at the whole of it, we can say what is the cause of suit. Of course, we are not to allow a plaintiff to succeed upon a cause of action which is not in the plaint, but the language of these plaints is not to be read too strictly, and we certainly are not willing to give effect to any technical objections arising upon it.

The plaint in substance is that Mohendro Narain Singh having brought a suit to obtain possession of an 8-annas share in the village, namely, the share which belonged to his mother, on the ground that the defendant was not entitled to retain possession of it, the Court found that the title to the possession which the defendant set up, namely, under a pottah which was granted to his father by the three widows, was no answer to the suit; but this Court, when the case came before it in special appeal, appears to

Digitized by Google

have thought that there might be some ground upon which it would be proper, notwithstanding that the defendant had not the right which he claimed, to allow him to be treated as having some right of occupancy. It is not clear that the Court intended to do more than declare that he was to be treated as having had a right to occupy between the institution of the suit and its termination; that they meant that he was to have a right to occupy for ever afterwards. They seem to have considered that during the period between the institution of the suit and the final decree he might only be charged with a proper rent. The judgment and the decree which was made upon it declared that Chunder Narain was entitled to hold possession on payment of a proper rent, and he was liable for rent at that rate from the date of suit, that is, from the 26th of February 1862.

The decree left undefined what the rent was to be. It was imperfect. It was not a decree for *mesne profits*, for the defendant was not treated as a trespasser and made liable for *mesne profits*, but was put in the position of an occupier and made to pay rent. We think the Court was right in holding that the rent could not be ascertained in the execution of that decree. The Judicial Commissioner said that there must be a separate suit. And the suit which has been instituted for the determination of what is the proper rent is a suit to carry out the decree of the 11th of January 1871. It is to complete it by having determined what is the proper rent. There is no question here of enhancement of rent, and the law as to notice of enhancement is not in any way applicable. What the Lower Court had to do is to ascertain by evidence what is a proper rate of rent to be paid from the time of the institution of the suit, namely, the 26th of February 1862 until the date of its decree, having regard to the fact that it is in the first place to be a proper rent on the 26th February 1862, and if any circumstances have occurred since to make a higher rent proper, they should be taken into consideration. Having ascertained this the Court should make a decree accordingly. That is the matter which ought to be tried, and the the suit must be remanded to the Lower Court in order that it may be done, as it does not appear that the parties are not entitled to give evidence on this subject which they did not produce when the judgment from which this appeal is brought was given. The costs will abide the result.

The 27th January 1875.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble E. G. Birch, *Judge*.

Pleadings—Cross-objection.

Case No. 818 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Rajshahye, dated the 23rd December 1873, modifying a decision of the Subordinate Judge of Beauleah, dated the 21st November 1872.

Coomar Puresh Narain Roy (one of the Plaintiffs) *Appellant*,

versus

Messrs. R. Watson and Co. and others (Defendants) *Repondents*.

Baboo Issur Chunder Chuckerbutty for Appellant.

Mr. R. T. Allan for Respondents.

Where the appellant's pleader asks to be allowed to withdraw from the appeal before the hearing begins, the respondent's pleader cannot be heard upon cross-objection.

Couch, C.J.—We agree with the rule laid down in the cases reported in IX Weekly Reporter, page 328, and XIV Weekly Reporter, page 210, and as the hearing of the appeal had not begun when the appellant's pleader asked to be allowed to withdraw from it, we think Mr. Allan cannot be heard upon cross-objection. The case referred to by him from the 3rd Madras High Court Reports, page 302, does not apply, as there the application to be allowed to withdraw from the appeal was made after the hearing had begun. The appeal will be dismissed with costs, and these will not include the costs of the objections which would have been taken if the appeal had gone to a hearing.

Digitized by Google

The 27th January 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Infringement of Rights—Cause of Action.

Case No. 1652 of 1874.

Special Appeal from a decision passed by the Officiating Judge of West Burdwan, dated the 21st April 1874, reversing a decision of the Moonsiff of Bishenpore, dated the 10th April 1873.

Ram Chand Chuckerbutty (Defendant) *Appellant,*

versus

Nuddiar Chand Ghose and another (Plaintiffs) *Respondents.*

Baboo Radhika Churn Mitter for Appellant.

Baboo Nil Madhub Sen for Respondents.

In order to maintain an action upon an infringement of a right, it is not necessary to show that there has been any subsequent injury consequent upon such infringement.

Mitter, J.—In this case the special appellant was the defendant in the Court below. The plaintiff's suit was to remove a bund by which the plaintiff has been deprived of the full supply of water in a natural stream. The defendant's defence was that he was entitled to put this bund in the place where it has been put, by custom and immomorial usage. The Lower Appellate Court has found that the defendant has failed to make out this defence, and the plaintiff's suit has been accordingly decreed. In special appeal the only ground which has been urged is that the plaintiff having failed to prove any injury resulting from the act of the defendant, the Lower Appellate Court should have dismissed the suit as not maintainable. We think that the proposition of law laid down by the District Judge is quite correct. If there be a right, and if there be an infringement of that right, it is not necessary to maintain an action to show that there has been any subsequent injury consequent upon such infringement. In this case it was never denied that the plaintiff is a riparian owner, and that he had a right to take water from this natural stream to irrigate his lands. What was pleaded was that the defendant and his fellow villagers had a prescriptive right to stop this natural course of water. Therefore the right of the plaintiff having been admitted to have been infringed by the defendant, the question was whether that infringement was justified or not. The Lower Appellate Court has found that the defendant's plea has not been made out. Therefore the decree given in favor of the plaintiff is right.

The special appeal is dismissed with costs.

Glover, J.—I concur.

The 27th January 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Will—Gift—Special Appeal.

Case No. 1654 of 1874.

Special Appeal from a decision passed by the Officiating Subordinate Judge of Beerbhoom, dated the 10th April 1874, affirming a decision of the Moonsiff of Bulpore, dated the 17th December 1873.

Radha Bullubh Chuckerbutty and another (Plaintiffs) *Appellants,*

versus

Banee Madhub Chuckerbutty and another (Defendants) *Respondents.*

Baboo Kishen Komul Bhuttacharjee for Appellants.

No one for Respondents.

In a suit to recover certain property left by one R, both the Lower Courts found that it had been left by R before his death to defendants by way of gift. In special appeal, the plaintiffs raised the objection that under the Hindoo Wills Act a verbal will of this kind was not legal.

HELD that after two Courts had decided unfavorably to plaintiff the only case raised by him there, he could now turn round and throw out the defendants' case on a technical ground that the alleged gift was really a will.

Glover, J.—THE plaintiffs sued to recover certain property, moveable and immoveable, left by their kinsman Ram Lall Chuckerbutty who died in 1279. The defendants replied that a considerable portion of the property had never belonged to Ram Lall, and that the remainder had been made over to them, the defendants, by Ram Lall before his death by way of gift. Both the Courts below have found that this was the state of facts, and that the property which Ram Lall had before his death, was given by him to the

Digitized by Google

defendants. The question raised in special appeal is that under the Hindoo Wills Act, a verbal will of this kind is not legal. But we may observe that this objection is now for the first time brought forward. There was no mention of it throughout the proceedings of the Courts below. No body ever called Ram Lall's proceeding a will, and the evidence which has been read to us describes it as a gift. There was nothing extraordinary in Ram Lall's making this gift. If it was a will, it was for the plaintiff to make and prove that allegation in the Court below. And when two Courts have heard and decided unfavorably to the plaintiff the only case made by him, namely, that no gift was made, he cannot now turn round and throw the defendant's case out on a technical ground that it was not really a gift but a will.

The special appeal must be dismissed, but without costs no one appearing for the respondents.

The 28th January 1875.

Present :

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Joint Hindoo Family—Separation—Legal Representative.

Case No. 9 of 1874.

Regular Appeal from a decision passed by the Officiating Deputy Commissioner of Hazareebaugh, dated the 20th September 1873.

Tekait Churamun Singh (Plaintiff) *Appellant,*

versus

Kullyan Sahy (Defendant) *Respondent.*

Mr. H. E. Mendies and *Baboo Romesh Chunder Bose* for Appellant.

Mr. C. Gregory for Respondent.

A Hindoo brother who, during the lifetime of a deceased debtor, was separate in transaction and lived separately from him, and was, therefore, not a joint member of the same family, is not his legal representative after death.

Mitter, J.—This was a suit brought by the plaintiff to recover Rs. 5,698-9 annas principal and interest from the defendant Kullyan Sahy. The allegation of the plaintiff was that Rajah Drigbejoy Sahy, the brother of the defendant Kullyan Sahy, on the 10th of Sawun 1277 Fuslee, executed a bond for Rs. 3,417-12-9 ; that the 30th of Bhadro 1277 was fixed as the date for the repayment of the loan ; that the defendant Kullyan Sahy was the legal representative of the deceased debtor Drigbejoy Sahy ; and that the money not having been paid the suit was brought to recover the amount due on that bond. The defence of the defendant Kullyan Sahy was that he was not the legal representative of his brother Drigbejoy ; and he also denied the genuineness of the bond. The Lower Court has found that the genuineness of the bond has been established to its satisfaction ; but it has dismissed the suit upon the ground that the defendant Kullyan Sahy has not been proved to be the party in possession of the property left by his deceased brother Drigbejoy. Both parties have appealed ; the plaintiff upon the ground that the finding of the Lower Court upon the question of possession of the property left by Drigbejoy is against the weight of the evidence ; and the defendant has preferred an objection under Section 348 of the Civil Procedure Code, upon the ground that the genuineness of the bond has not been established.

We think that the judgment of the Lower Court dismissing the plaintiff's suit is right. It appears to us that upon the evidence on the record, it is quite clear that Drigbejoy Singh died leaving a widow, and that during his lifetime he was separate in transaction and lived separately from his brother Kullyan Sahy the defendant. Upon this point, although there is a slight conflict of evidence, we think that upon the whole it has been satisfactorily made out that the defendant Kullyan Sahy was not a member of a joint Hindoo family with his brother Rajah Drigbejoy Singh deceased. One of the witnesses examined by the defendant, namely, Durao Singh, who is admitted to be a member of the family, and who is said, by one of the witnesses for the plaintiff, to be a cousin of the two brothers, distinctly proves the fact that after the death of the mother of these two brothers, which event took place in the year 1257, they lived separately in separate

Digitized by Google

dwelling-houses and their transactions were separate. His evidence upon this point is very clear, and the evidence of the witnesses examined by the plaintiff with reference to this question is vague, and against his testimony is not entitled to any weight whatever. We think, therefore, that the Lower Court upon this part of the case has rightly come to the conclusion that the defendant Kullyan Sahy was not a joint member of the family with his brother Drigbejoy Sahy deceased. That being so, it is clear that under the law the defendant Kullyan Sahy is not a legal representative of the deceased debtor; and upon this ground the suit should be dismissed.

But further we think that the judgment of the Lower Court upon the question as to the genuineness of the bond is not correct. The bond is alleged to have been executed on the 10th Sawun 1277, and the time for repayment was only a month and twenty days, the date fixed being the 30th of Bhadro of that year. It appears, therefore, that the plaintiff was inclined to give no time to the debtor for the repayment of the loan. We find also this to be a fact not disputed, namely, that in Assar 1278, Rajah Drigbejoy Singh died. But we do not find that any steps were taken by the plaintiff to recover this amount amicably from the debtor. The suit was not brought until 5th May 1873 corresponding with 9th Chyet 1280, against Kullyan Sahy who, as we have observed before, was not a joint member of a Hindoo family with his deceased brother, and who, upon the evidence of Durno Singh to which we have referred, was living at a very great distance from the house in which Drigbejoy was residing. Under these circumstances, the plaintiff will not be entitled to a decree unless the bond upon which he has brought this suit is proved beyond all doubt. Now the bond recites that Drigbejoy borrowed this money in lieu of an amount of money which on adjustment of accounts was found due to the plaintiff. The plaintiff in his plaint does not refer to this adjustment of accounts; he does not give any details as to the amount which was found due to him, and in lieu of which this bond was given. We find that one of his witnesses, namely, Loke Nath, states that the bond was executed on account of a former bond and chitpurzas. In order to support a transaction like this, the plaintiff is expected to produce his account-books to show the nature of the debt due to him on account of those chitpurzas. We find that no such account has been produced. One would also expect that some evidence of the former bond would be given by the plaintiff. All his witnesses deposed that this former bond was a registered document. Nothing could have been easier for the plaintiff to prove the transaction by calling upon the defendant to produce the old bond which is alleged to have been returned to the debtor, and on his failing to do so, by producing a copy thereof from the Registry office. This we find he has not done. Therefore there is a total want of evidence to prove the consideration for which this bond is alleged to have been executed. Then we find also that one Tajoo Moodee, who is alleged to have concluded this transaction on behalf of the plaintiff, has not been examined in this case. It is said by some of the plaintiff's witnesses that Tajoo Moodee handed to the Rajah the registered bond and the chit-purzas. No reason has been assigned why Tajoo Moodee has not been produced. We also find that there is a provision in the bond that the holder of it will be entitled to recover the amount due on it under Section 52 of the Registration Act (XX of 1866). This bond, as a matter of fact, we find has not been registered. From this provision in the document, it is clear that the parties, if it was a genuine document, had intended that it should be registered. No explanation has been given why they subsequently altered their mind and the document was not registered. The witnesses depose that, as soon as the bond was drawn up and the Rajah put his signature upon it, it was made over to the plaintiff then and there. It is very unlikely that if the parties had intended to have this document registered, it would be handed over to the plaintiff immediately after the signature of the Rajah was put upon it, without making any arrangement for the registration of the document. These facts show that the transaction upon which the plaintiff relies is not a very probably one, and as far as the probabilities of the case are concerned, they tell very clearly against the truth of the plaintiff's claim. Then, when we examine the direct evidence that has been adduced, we find that it is far from being satisfactory. The plaintiff has examined the alleged writer of this bond Harit Singh. It is not shown why this bond was written by him. It is not shown on the face of his deposition how he came to be present in the assembly where the bond is alleged to have been executed, and his deposition is so meagre that we cannot

Digitized by Google

gather from it under what circumstances his assistance was availed of for the purpose of drawing up this bond. In a transaction like this, the parties naturally require either the person executing the document, or some party connected with him, to write out the deed. It is admitted in this case by many of the witnesses for the plaintiff that a person named Domun Pandah was present at the time when this document was alleged to have been executed, and this Domun Pandah was alleged to have been the karpurdauz of Drigbejoy Singh, the debtor. Now this Domun Pandah has been examined on behalf of the defendant. He deposes that he knows to read and write. It is very improbable that, if Domun Pandah was present, who was the servant of the Rajah Drigbejoy, and if he knew to read and write, he would not be the person who would be asked to write out this document. To explain this, one of the plaintiff's witnesses, namely, Chetra Lall, has deposed that Domun did not know to read and write. We find that in this case Domun has distinctly stated in his deposition that he knows to read and write, and no attempt was made by the plaintiff to shake his statement which could have been easily done, if the fact were so that he did not know to read and write. We think that upon this point we ought to prefer the statement of Domun to that of the witness Chetra Singh on behalf of the plaintiff. The same observation also applies to the other witnesses. It is not shown why they were present in the house of Drigbejoy Singh or how they were connected either with the person executing the bond or the party in whose favor it was executed. They seem to be utter strangers, and almost all of them appear to be the residents of a very distant village. Upon the whole it does not appear to us that the evidence that has been adduced in this case on behalf of the plaintiff to prove the execution of this bond is satisfactory. That being so, we think that the genuineness of the bond has not been established.

For these reasons we are of opinion that the judgment of the Lower Court dismissing the plaintiff's suit is right, and it is accordingly dismissed with all the costs of this Court and of the Court below.

Glover, J.—I concur in dismissing the appeal with costs.

The 28th January 1875.

Present:

The Hon'ble E. G. Birch, *Judge.*

Execution Sale—Jurisdiction—Act VIII of 1859 *s.* 286.

Case No. 986 of 1874.

Special Appeal from a decision passed by the 2nd Subordinate Judge of Backergunge, dated the 4th February 1874, *reversing a decision of the Sudder Moonsiff of that district, dated the* 31*st May* 1873.

Syud Nowab Ali (Plaintiff) *Appellant,*

versus

Shaikh Uzir Mahomed (Defendant) *Respondent.*

Baboo Bhoobun Mohun Dass for Appellant.

Baboo Bhowanee Churn Dutt for Respondent.

A Moonsiff is not competent, under Act VIII of 1859 s. 286, to bring to sale property lying without his own jurisdiction, without reference to any other Court.

The pleader for the respondent having left the Court in the middle of the argument for the appellant, and although sent for, not having put in his appearance, I must dispose of the case on the materials before me.

It appears that the present suit was brought to establish plaintiff's right to the receipt of rent for the land in dispute as belonging to his 2½ annas share of talook Joy Deb Doss, which he said he had purchased on the 9th November 1865 in execution of decree.

Digitized by Google

The defendant's answer was that the land had been sold to another party, and that he was the tenant of that third party.

The Moonsiff found that the sale set up by the defendant was no bar to the plaintiff's right; that the bynamah relied upon by the defendant mentioned the kismut, not in the way of description of the talook, but as a restriction of what was actually sold and conveyed. In effect he held that the purchase of the plaintiff prevailed over that which was set up by the defendant in bar of the plaintiff's right to recover. The Moonsiff also found that the plaintiff's evidence satisfactorily established that the defendant had paid rent to the plaintiff, and had acknowledged the plaintiff's right. He accordingly passed a decree in favor of the plaintiff.

Upon the case coming upon appeal, the Subordinate Judge reversed the decision of the Moonsiff and dismissed the plaintiff's claim with costs. He propounds the novel doctrine that the Moonsiff of one chowkey can under Section 286 of Act VIII of 1859, without reference to another Court, bring to sale property lying without his own jurisdiction; that such sale made by him is valid and will prevail. He goes on to observe that it cannot be held that the kismut in question was not sold because it was not mentioned in the sale certificate, inasmuch as when the Moonsiff declared by the sale certificate that he sold 4 annas share of the talook, all the kismut appertaining to that talook passed thereby, whether set out in the sale certificate or not, and whether the said four annas share was comprised within the Moonsiff's jurisdiction, or partly in and partly outside of it. The view of the law propounded by the Subordinate Judge is so manifestly erroneous that it requires no refutation. If the Moonsiff of Patookhalee did sell property which was not within his jurisdiction, he had no right to do so; and such a sale would be null and void.

The judgment of the first Court is a sound one and is in accordance with law, and that of the Subordinate Judge setting aside that judgment is wrong in law and must be set aside.

The special appeal is decreed with costs.

The 29th January 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Certificate under Act XXVII of 1860—*Joint Hindoo Family.*

Case No. 388 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Cuttack, dated the 13*th August* 1874.

Chowdhry Kripa Sindhoo Doss (Petitioner) *Appellant,*

versus

Radha Churn Doss and another (Objectors) *Respondents.*

Baboos Obhoy Churn Bose and *Aubinash Chunder Banerjee* for Appellant.

Baboo Mohendro Lall Mitter for Respondents.

A certificate under Act XXVII of 1860 cannot be refused merely because the deceased was a member of a joint Hindoo family. Ordinarily the managing member would be the person best entitled to the certificate, but this would not be the case where the members had fallen out.

Mitter, J.—In this case an application was made by Kripa Sindhoo for a certificate to collect debts due to one Sham Soonder. Kripa Sindhoo alleged that he was an adopted son of the deceased Sham Soonder, who had a brother Shadhoo Churn and a cousin Radha Churn, who although an uterine brother of Sham Soonder, had been adopted by his uncle Kanye Churn. This application was opposed by two persons, first, by Radha Churn, the son of Kanye Churn and Muddun Soonder, the grandson of Radha Churn. The objection of Radha Churn was based on this, that Kripa Sindhoo was not the adopted son of Sham Soonder; that the family was a joint Hindoo family; and that, therefore, Kripa Sindhoo was not entitled to obtain the certificate asked for. The objection of Muddun Soonder was upon the allegation that he was the adopted son of one Arotbundhoo, who, it is admitted by both parties, was an adopted son of Sham Soonder, deceased. The District Judge has found that Muddun Soonder's objection has not been made out. He has also held that Kripa Sindhoo's adoption has not been established. He has further found upon the evidence hat Sham Soonder was a member

Digitized by Google

of a joint Hindoo family, consisting of himself and his brother Shadhoo Churn and his cousin Radha Churn. The Judge has refused the application of Kripa Sindhoo upon two grounds—first, that as Sham Soonder was a member of a joint Hindoo family, Kripa Sindhoo, even if his allegation of adoption be true, is not entitled to a certificate, because no separate debts have been shown to have been due to Sham Soonder—and, secondly, that, as I have observed before, Kripa Sindhoo has failed to prove the fact of his adoption. On appeal it has been urged before us that the real question to be determined in this case is, whether or no Kripa Sindhoo was duly adopted by Sham Soonder. If that fact be proved, he would be entitled to a certificate to collect debts whether Sham Soonder was a member of a joint Hindoo family, or he had separate property of his own. It is also urged that the Lower Court is wrong in its decision upon the question of adoption of Kripa Sindhoo, because it has been established by satisfactory evidence.

With reference to the first question, we think that the Judge was not right in his view of the law. Supposing that this family was a joint Hindoo family, still the debts that were due to the members of this joint family were the debts due to the deceased as well as to the other members of the family; and under Section 2 of Act XXVII of 1860, so far as the deceased is concerned, no debtor can be compelled to pay the debts due to the joint family unless a person obtain a certificate under the Act to represent the deceased in the joint family. Therefore it is clear that even, according to the view of the District Judge, there was a clear necessity that some body should obtain a certificate to represent the deceased for the purpose of collecting debts. Now in an ordinary case of a joint Hindoo family governed by Mitakshara law, under Section 3 of the Act the managing member would be the person who would have the best title to the certificate. But in this case, we find that although the family is joint to a certain extent, the members of it have already fallen out, and under these circumstances it would not be the right course to pursue to grant the certificate to one of them as the managing member of the family, when it is quite clear that they no longer agree with each other. If Kripa Sindhoo were really adopted, the share of the joint debt due to Sham Soonder, deceased, would alternately devolve on him, and under the circumstances stated above, even supposing that the family is a joint Hindoo family, and there are no separate debts of Sham Soonder, we think that under Section 3, Kripa Sindhoo is the person who is entitled to the certificate. Therefore the only question which we have to determine in this case is, whether, upon the evidence, Kripa Sindhoo is, as alleged by him, the adopted son of Sham Soonder; and upon this point we think that the judgment of the Lower Court is not correct. The fact of Kripa Sindhoo's adoption is proved by three witnesses: one of them is a member of the family, and a quite independent witness, namely, Bhugoban Doss. There is no valid reason assigned why his evidence has been disbelieved by the Lower Court. The adoption of Kripa Sindhoo has been to a very great extent established by the witness of the name of Kebulanund Doss, who is certainly a hostile witness. He proves that Sham Soonder, during his lifetime, on the occasion of Kripa Sindhoo's marriage, styled the latter as his son. This certainly would not have been the case, if he had not been the adopted son of Sham Soonder. We further find that Radha Churn in his own deposition, with great hesitation, denies the fact of this adoption. He first of all says that he does not know whether Kripa Sindhoo was adopted or not; then he says with some hesitation that he was not. If the fact were so, that Kripa Sindhoo was not adopted, surely Radha Churn would not have hesitated to state it. Then we also find one further fact which although I do not mean to say is conclusive upon the point has a material bearing upon the question at issue. Radha Churn, in his deposition, says that on the death of Sham Soonder, Kripa Sindhoo put fire to his mouth. Then although Radha Churn says that Kripa Sindhoo did so as a nephew of the deceased, yet it must be remembered that Dinobundhoo was the elder of Kripa Sindhoo, and if Kripa Sindhoo had not been adopted according to the custom of the Hindoos, one would have expected that Dinobundhoo would have put fire to the mouth of the deceased Sham Soonder. As I have observed before, although this fact is not conclusive, still in the absence of any explanation it may be taken as corroborative of the direct evidence adduced in support of the adoption. Upon the whole we think that the evidence which has been given on behalf of Kripa Sindhoo in this case is quite sufficient to establish his adoption; and that, therefore, he is entitled to the certificate to collect the debts due to his deceased father.

The judgment of the Lower Court, there-

Digitized by Google

fore, will be set aside, and the Lower Court be directed to grant a certificate to Kripa Sindhoo, entitling him to collect the debts due to Sham Soonder. The appeal will be decreed with costs. Vakeel's fees one gold mohur.

Glover, J.—I concur in this judgment.

The 3rd June 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Deed of Gift—Construction.

Case No. 1458 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Hooghly, dated the 31st December 1872, *affirming a decision of the First Subordinate Judge of that district, dated the 10th April* 1871.

Hureehur Mookerjee (Defendant) *Appellant,*

versus

Raj Kishen Mookerjee (Plaintiff) *Respondent.*

Mr. Branson for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

Where a father executed a deed of gift in favor of his son with the condition that the son should take the property subject to the same liability in respect of the maintenance of the family as it was subject to in the hands of the father:

HELD, that this was not an obligation entered into by father or son as a matter of contract; but a reservation in the father's gift which did not give the son a greater right to be maintained at the expense of the father, or in the family house, than he had before.

Couch, C.J. — THE questions in this special appeal are, what is the construction of the deed of gift, and, whether, anything has occurred in the defendant's leaving his father's house which will prevent the operation of the deed.

The nature of the transaction is that the father was about to give to his son a very considerable share of the property belonging to him, and to which the son had no legal title, it being absolutely at the father's disposal.

The income of the property, if it had remained with the father, would have been applied in the same manner as the income of other property which the father had, namely, in the payment of the expenses of the father's family,—in what may be called, the maintenance of the family. And the condition in the deed appears to us to reserve that liability. The intention evidently was that the son should take the property subject to the same liability in respect of the maintenance of the family as it was subject to in the hands of the father. It is not an obligation which the father or the son enters *into* as a matter of contract, as Mr. Branson appears to have thought in one part of his argument. It is a reservation in the father's gift. He gives away the property reserving this, and whatever right the father had before he made this gift in respect of allowing his son to continue to live in the family-house and to form part of his family, remained in him. The circumstance that he had given to his son the property with this reservation, did not give the son a greater right to be maintained at the expense of the father or in the family house than he had before. It is not material whether the son's leaving the father's house was a voluntary act, or whether there was any compulsion used; for, if no obligation was created on the part of the father, and the father refused to allow the son to remain, there was nothing that the father had not a right to do.

We think upon the fair construction of this deed, that the son had no defence to the claim on the part of the father to be paid a proportionate share of the expenses of the maintenance of the family-house and the other expenses which are described in the deed of gift. Therefore the special appeal will be dismissed. There will be no separate costs of it.

In the regular appeal we must direct the Lower Court to enquire and find in the same manner as it has done with regard to the year 1276 what is the amount of the profits of the two estates respectively for the year 1277, and to return its finding to this Court.

Digitized by Google

The 25th November 1874.

Present :

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Right of Occupancy.

Case No. 1278 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Nuddea, dated the 24th March 1874, reversing a decision of the Moonsiff of Kooshtea, dated the 10th August 1872.

Kherode Chunder Roy (Plaintiff) *Appellant,*

versus

Mr. D. M. Gordon (Defendant) *Respondent.*

Baboo Bungshee Dhur Sen for Appellant.

Baboo Sreenath Banerjee for Respondent.

Occupancy for twelve years cannot give a right of occupancy where the occupation by the occupant alone did not extend to twelve years, nor was it the occupation of land which he had inherited.

Jackson, J.—We think the judgment of the Lower Appellate Court reversing the decree of the Moonsiff is erroneous. The plaintiff, it seems, is a farmer under Government of a piece of land which was an accretion to an estate, No. 839, belonging to Narainee Burmonee. That lady refused the settlement on which the land was given in farm to the plaintiff. The defendant is occupying the land and growing indigo within the limits of the farm. The plaintiff called upon the defendant to pay him rent and enter into a contract with him which the defendant refused to do, and alleged that he pays rent to Narainee Burmonee. The twelve years' occupancy which he sets up is not that which gives him the right of occupancy, because the occupation by him alone did not extend to twelve years, nor was it the occupation of land which he had *inherited* from his father or any other person. If then he chooses to set himself up against his landlord, refuses to pay him rent or enter into an agreement with him, he is liable to be ejected. The judgment of the Moonsiff, we think, is right and must be restored with costs.

The 26th November 1874.

Present :

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Lease—Ferry.

Case No. 1302 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 25th March 1874, reversing a decision of the Moonsiff of Manickgunge, dated the 21st July 1873.

Juggut Chunder Chowdhry and others (Plaintiffs) *Appellants,*

versus

Bhurut Chunder Chowdhry and others (Defendants) *Respondents.*

Baboo Kalee Mohun Doss for Appellants.

Baboos Sreenath Dass and *Hem Chunder Banerjee* for Respondents.

It is quite competent to a lessor, when granting a lease of his land, to stipulate that no ferry shall be established thereupon to the prejudice of his own ferry (existent or possible) and it is quite competent to a lessee to agree to such a stipulation.

Jackson, J.—The present suit is brought upon the basis of an ekrar said to have been executed by the defendants, whereby, in taking a lease from the plaintiffs, they bound themselves not to establish a ferry in or near the land so leased to them. The defendants

Digitized by Google

raised various pleas, but the Moonsiff gave judgment against them on all the pleas, and awarded the plaintiffs rupees 100 as damages, and an injunction against the continuance of the ferry. On appeal, the Subordinate Judge tries only the question whether the agreement was or was not valid in law and binding on the defendants, and for reasons which he gives he holds it was not binding, and consequently reverses the judgment of the Court below. Now it has not been attempted before us to support the judgment of the Lower Appellate Court, and any attempt to support it would be clearly hopeless. It was quite competent to the plaintiffs, when granting a lease of their land to the defendants, to stipulate that no ferry should be established thereupon to the prejudice of plaintiffs' own ferry or possible ferry, and it was quite competent to the defendants to agree to such stipulation. The Moonsiff finds that they did so agree. We find no ground whatever for the view taken by the Subordinate Judge that such an agreement would be invalid or otherwise than binding on the parties who made it. It is contended, however, on the side of the defendants that they did not admit before the Lower Appellate Court the execution of the ekrar, but that, on the contrary, they made that fact, amongst others, a ground of appeal against the judgment of the Court of first instance. We are inclined to the opinion that they did not at the argument of the appeal intend to contest that point, but there is some room for doubt which can easily be removed by the Judge who heard the appeal. He will be able to say at once what the nature of the contention before him was. If he finds that the defendants on their appeal admitted the making of the ekrar, it will not be necessary to go further into that point; but if the case was such that they merely admitted it for the sake of argument, it will no doubt be necessary to find whether the ekrar was formally executed or not. If the ekrar be proved or admitted, it will then be necessary to find whether the defendants did, contrary to the stipulations in the ekrar, establish any ferry whereby the plaintiffs had been endamaged, and whereby the plaintiffs are entitled to any and to what relief. The case will be remanded accordingly. The respondents must pay the costs of this special appeal.

The 30th November 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Landlord and Tenant—Ejectment.

Case No. 1393 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Dacca, dated the 14th March 1874, *affirming a decision of the Additional Moonsiff of Moonsheegunge, dated the 30th December* 1873.

Nubo Coomar Ghose and others (Plaintiffs) *Appellants,*

versus

Oozir Shikdar and another (Defendants) *Respondents.*

Mr. C. Jackson and *Baboos Nullit Chunder Sen* and *Rash Beharee Ghose* for Appellants.

Baboos Ashootosh Dhur and *Bussunt Coomar Bose* for Respondents.

A landlord is entitled to eject his tenant after notice, unless debarred by certain rights of the tenant. He is not required to prove the absence of the circumstances which entitle that tenant to retain possession.

Jackson, J.—THE Judge says in his judgment in this case: "I shall always hold that a landlord who seeks to eject a tenant is bound to show his title to do so." That may be either a very harmless proposition or a very dangerous one. If he means to say that the landlord is bound to show his title to the land, he may be correct, but if he means to say that a landlord seeking to eject his tenant must prove the absence of the circumstances which entitle that tenant to retain possession of the land, we differ from him, and we presume that he will not hold that view after receiving this expression of the opinion of this Court that he is mistaken. We have no doubt that a landlord is entitled to eject his tenant after notice unless debarred of the power to do so by certain rights of the tenant of which the right of occupancy is one, and the right of occupancy arises from twelve years' occupation of the land, and not from any document. The case must go back to the Lower Appellate Court to find whether or not the tenant has made out his twelve years' occupation of this land. The costs of this appeal will follow the result.

Digitized by Google

The 27th January 1875.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble Louis S. Jackson, *Judge.*

Land Acquisition Act (X of 1870)—Jurisdiction—High Court Act, s. 15.

*Application for review of an order made by the Hon'ble Sir Richard Couch, Kt., Chief Justice, and the Hon'ble Louis S. Jackson, one of the Judges of this Court, on the 15th December 1874, in Rule No. 896 of 1874.**

W. H. Verner, Collector under Act X of 1870 for 24-Pergunnahs (Opposite Party) *Petitioner,*

versus

Syud Abdool Ali (Petitioner) *Opposite Party.*

The Advocate-General and *Baboo Unnoda Pershad Banerjee* for Petitioner.

No one for Opposite Party.

A Court constituted under Act X of 1870 comes within the meaning of the High Court's Act, s. 15, *i.e.*, is a Court subject to the appellate jurisdiction of the High Court.

Couch, C.J.—I THINK that the construction which Mr. Beaufort put upon Mr. Rowe's opinion in the judgment which Mr. Beaufort gave was the proper one, and that the opinion which we formed of Mr. Rowe's award upon the statement of it by Mr. Beaufort is correct. Looking at the statement of Mr. Rowe's opinion, to which our attention has now been called, it does not appear to me that the words which were omitted by Mr. Beaufort make any real difference in the fair meaning of Mr. Rowe's language. If the language were ambiguous and might fairly bear the construction which the learned Advocate-General contends for, as well as that which I think is the right one, still it appears to me that in a case of this description it ought to be quite clear and free from ambiguity that the compensation has been awarded for the land below high water mark. The Collector very properly made his offer for the land above and the land below high water mark separately, and it was necessary that it should be separately assessed in such a manner that the parties might know what the Judge and the assessors intended. I see no reason for altering the opinion which I formed when our attention was only called to the statement of Mr. Rowe's opinion by Mr. Beaufort, now that we have had the full note of that opinion read to us by the Advocate-General.

Another question which has been raised by the learned Advocate-General is as to the jurisdiction of this Court. The 15th Section of the Act for establishing the Court gives to it a superintendence over all Courts which may be subject to its appellate jurisdiction. The Section goes on to give to the Court power to call for returns, and to direct the transfer of any suit or appeal from any such Court to any other Court of equal or superior jurisdiction, and to make and issue general rules for regulating the practice and proceedings of such Court, and also to prescribe forms for every proceeding in the said Courts. I think these words cannot be taken as restricting the previous words which give superintendence over all Courts subject to the appellate jurisdiction of this Court, and as limiting the exercise of that power to Courts for which it may be desirable that this Court should issue general rules for regulating their practice and proceedings and should prescribe forms. But I am not prepared to say if the question arose, that this Court might not exercise the power of regulating the proceedings of these compensation Courts as I may call them. It is not necessary for us now to decide that.

Then the question is, can this Court constituted under Act X of 1870 be said to be a Court which is subject to the appellate jurisdiction of the High Court.

The 35th Section of the Act says that if the Judge differs from both the assessors as to the amount of compensation, he shall pronounce his decision, and the Collector may appeal therefrom to the Court of the District Judge, unless the Judge whose decision is appealed from is the District Judge, or unless the amount which the Judge proposes to award exceeds Rs. 5,000, in either of which cases the appeal shall lie to the High Court. To say that the compensation (I use that term as describing it generally) does not come within the meaning of Section XV of the High Courts Act,

* *Ante* p. 73.

Digitized by Google

because the appeal only lies to this Court in certain cases where the amount of the compensation proposed to be awarded exceeds Rs. 5,000, or where the decision appealed from is that of the District Judge, would, I think, be an unreasonable construction of the Section. It is not the less the appellate Court because in certain cases only an appeal lies to it. There are instances where, in suits of a certain description, an appeal does not lie from the original Court to this Court, whilst in other cases it does, and this Court is still the Appellate Court within the meaning of Section 14, and has power to superintend the proceedings of the original Court.

The other point raised by the learned Advocate-General, as I understand him (I am not sure that I understood him correctly) is that the awarding compensation is not a proceeding of the Court, but a proceeding of the Judge and the assessors, and that there is a distinction between the Court and the Judge and assessors. I think an examination of the Sections shows that there is no force in this objection. Section 18, the first in Part III of the Act, which Part is headed "Reference to Court and procedure thereon," speaks of what is to be done by the Collector in making the reference. After the reference is made to the Court, a notice is to be served on the persons named in it, requiring them to state to the Court the sum claimed as compensation, and a notice is to be served on the Collector. Then it proceeds to state how the Court is to be constituted for the purpose of assessing the compensation, namely, two assessors are to be added to the Judge. And the Judge and the two assessors constitute the Court for the purpose of determining the amount of the compensation. The 24th Section says how they are to do it, the Judge and the assessors being then the constituted Court for the purpose. And so the Act proceeds, Section 32 saying that the costs of all proceedings taken under the Act by order of the Court shall in the first instance be paid by the Collector, and Section 34 providing for how the award shall be signed, namely, by both the Judge and the assessors. Then Part IV shows how another duty is to be performed, namely, the apportionment of the compensation. When the proportions are to be determined the Court is to be the Judge sitting alone.

The Sections in Part III appear to me to show that the Court which performs the duties required by those Sections to be performed is the Judge and the assessors. It comes within the meaning of Section 14 of the High Court's Act, that is, it is a Court which is subject to the appellate jurisdiction of the High Court in certain cases.

I therefore think no ground has been shown for reviewing our decision.

Jackson, J.—I am of the same opinion upon all the points raised today. As to the opinion of Mr. Rowe, the course taken by the learned Advocate-General might possibly seem to suggest (and I say this because this matter came before me in its first stage and not before the Chief Justice) that the opinion had not, when the rule was applied for, been submitted to the Court *in extenso*. It is right to say that that opinion was in its exact words annexed to the petition of Abdool Ali, and was, I am sure, considered by myself and my brother McDonell in granting the rule. If in delivering judgment in this matter the learned Chief Justice referred to the statement of Mr. Rowe's opinion contained in the judgment of Mr. Beaufort, it no doubt was because the gentlemen who appeared before us and argued the matter were not conscious of any real difference between the opinion as stated in the judgment and as expressed in Mr. Rowe's own words. That which Mr. Beaufort states as the effect of Mr. Rowe's opinion is a paraphrase of it rather than a quotation of any portion of it, and it probably was caused by the understanding which Mr. Beaufort arrived at of Mr. Rowe's opinion after discussing the matter with him. I think it is almost too clear for discussion that Mr. Rowe, not considering the claimant entitled to any compensation in respect of the land below high-water mark, and for that reason not deeming it necessary to estimate the exact value of the land above high-water mark, and being aware that the Court would be bound to award a sum not less than what the Collector had offered, expressed it as his opinion that the offer made by the Collector, taken as a whole, was a liberal one.

Then as to the question of jurisdiction I have no doubt at all. I think in the first place that where any Court is constituted by the legislature here in respect of which the High Court is the Appellate Court, whether the right of appeal be general, or whether it be restricted, the jurisdiction given by Section XV of the High Court's Act applies, and if we were now to begin limiting that jurisdiction by reference to the

Digitized by Google

fact that appeals in certain cases are withdrawn, we should probably find that the superintending jurisdiction of this Court would have to be given up altogether, because there is scarcely a single Court in respect of which an appeal is not in some instance or other taken away by some provision of law.

But in addition to that it must be borne in mind that these Courts constituted under Act X of 1870 are no other than one or other of the regular Civil Courts of the country, all of which, with the exception of Small Cause Courts, arrive at their decisions subject to appeal to the High Court.

The 3rd part of the Land Acquisition Act contains the Sections relating to a reference to the Court and the procedure thereon, and one of these Sections confers upon the Court constituted as the Act requires the power of giving a decision in the case which shall be final under certain circumstances, namely, where the Judge and one or both of the assessors shall agree as to the amount of the compensation. That therefore limits the appeal; but where the Judge differs from both the assessors as to the amount of compensation an appeal lies from his decision. In that case, therefore, the decision of the Court is subject to the appellate jurisdiction of the High Court. It seems to me, therefore, that the superintending jurisdiction arises; and I am bound to say, from the experience we have of awards made in these cases, that it would be a matter of regret if this Court had not or were disabled from exercising that jurisdiction. We have seen enough to show how necessary it is that the procedure of the Courts acting under Act X of 1870 should be submitted to something more than the ordinary appeal given by the Act.

As to the 3rd point, I confess I was somewhat surprised to find that the learned Advocate General raised it, for nothing can be clearer than that the word "Court" wherever it is used in the Act means the Court made up in certain cases of the Judge and the assessors; and Section 39, upon which so much stress was laid, merely refers to the cases where the amount of the compensation had to be settled by the Court constituted under the Act as distinguished from those cases referred to in Section 38, where the amount of compensation has been settled under Section 14 by the Collector, and the compensation settled by the Court is no doubt the compensation set out in the award described in Section 34.

The 29th January 1875.

Present:

The Hon'ble E. G. Birch and W. F. McDonell, *Judges.*

Will—Copies—Evidence—Act I of 1872 *ss.* 65 *and* 66.

Case No. 1445 of 1874.

Special Appeal from a decision passed by the Officiating Additional Judge of Jessore, dated the 6th April 1874, *reversing a decision of the 3rd Additional Moonsiff of that district, dated the 20th August* 1873.

Prosunno Coomar Pal (Defendant) *Appellant,*

versus

Chunder Coomar Roy and others (Plaintiffs) *Respondents.*

Baboo Grish Chunder Ghose for Appellant.

Baboo Bungshee Dhur Sen for Respondents.

Before a copy of a will is admissible as evidence, it is incumbent on the Court to call upon the party in whose possession the will is to file the original.

Birch, J.—We cannot consider the way in which the Judge has disposed of this case at all satisfactory. He concludes his judgment in these words:—"Plaintiff claims a

Digitized by Google

"certain amount; defendant says it is too "much. Plaintiff gives *some* evidence to "prove his statement and defendant gives "none. I think, therefore, that plaintiff "must be held to have made out a case which "it was necessary for defendant to rebut, and "as he has not attempted to do so I decree "the appeal with costs and interest." The Judge uses the words "some evidence." When we come to see what he means by the words, we find he first relies upon a will regarding which he says:—"The original will being apparently in defendant's possession, it was competent for plaintiff to file a copy." The Judge forgets that before a copy could be admissible, it was incumbent upon the Court under Sections 65 and 66 of the Evidence Act to call upon the party in whose possession the will was to file the original, and that if this was not done it was not open to the Court to look at this will at all. Upon this point we think that the Moonsiff's opinion is correct, and that the Judge was wrong in looking at this will at all and that we cannot look at it.

Then the Judge says that the bakeejai papers "corroborate the other evidence." What that other evidence is his judgment does not disclose. This being so, it might have been necessary for us to remand the case, pointing out to the Judge the errors into which he has fallen, if we found that there was any evidence on the record which was worthy of further consideration. We have gone rather out of our usual course in this case to look into the record with a view to seeing what course we ought to adopt. All that there is on the record in the way of oral evidence is the deposition of the gomastah which certainly does not establish the plaintiff's case. He does attest the bakeejai papers, but on reference to these papers it is apparent that they purport to be accounts of collections made from the defendant, and they cannot be relied upon as determining the jumma at which the defendant held this tenure. Upon the whole case, we think we should not be justified in remanding it. We consider that the decision which the Moonsiff has arrived at is the correct one, and that the Judge, proceeding on an erroneous view of what was required of plaintiff in a case of this sort, and considering evidence which he should not have looked at, has committed a material error. We set aside the judgment of the Lower Appellate Court and restore that of the Moonsiff. The special appeal is decreed with costs.

The 30th January 1875.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Suit by Certificate under Act XL of 1858—Manager's Right of Action.

Case No. 289 of 1873.

Regular Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 2nd September 1873.

Mr. T. M. Gibbon (Plaintiff) *Appellant,*

versus

Bukhtar Tewaree (Defendant) *Respondent.*

The Advocate-General, Mr. Evans, Baboo Chunder Madhub Ghose and *Moonshee Mahomed Yusoof* for Appellant.

Mr. J. T. Woodroffe and *Baboo Mohesh Chunder Chowdhry* for Respondent.

In a suit by G, as manager of the Bettyah Raj and Reasut, and as trustee of the Maharaja Kooer Hurender K. S. Bahadoor, the son of Maharaja Rajender K. S. Bahadoor, against Bukhtar Tewarree described as the head huzooree, official attached to the Durbar of the Raja for an account of various expenditures or the balance due, and for a list of ornaments, &c., and to set aside an acquittance executed by the Maharaja Rajendro, the defendant pleaded *inter alia* that as the Kooer had now come of age, and the certificate, under Act XL of 1858, given to G as guardian of his estates had become inoperative, G had no right to institute the suit or to verify the plaint:

HELD that the only *locus standi* that G could have in the suit was as one of the members of a committee of guardianship and management appointed under an ekrarnamah, executed by Maharajah Rajender, which provided that the affairs of the Raja of every description were to be conducted according to the decision of the majority of the Committee; and as he had no authority from either of the two other members to bring this suit, he was not authorized to maintain it.

Kemp, J—MR. T. M. Gibbon sues as manager of the Bettyah Raj and Reasut, and as trustee of Maharajah Kooer Hurender Kishore Singh Bahadoor, the son of Maharajah Rajender Kishore Singh Bahadoor. The defendant is Bukhtar Tewaree, who is described as the head hujooree official attached to the Durbar of the Rajah of Bettyah. The suit is for an account of various expenditures to the amount of 9 lacs of rupees or for such sums as after taking an account may be found to be justly due by the defendant, and also for a list of ornaments, jewellery, gold, and silver utensils, &c., which had all along been in the tuhveel of the said defendant. The period for which the account is

Digitized by Google

called for is from 1272 to 1276 Fuslee. The suit has also for its object to set aside a furkhuttee or acquittance, dated the 26th of June 1870, executed by Maharajah Rajendro Kishore Singh Bahadoor; and the cause of action is said to have accrued on that day. It is further stated in the plaint that the defendant, although repeatedly called upon to do so, has not filed an account of his stewardship for the years stated above, that he agreed to give an account, but that in the meantime he has fraudulently procured an acquittance from the Maharajah of Bettyah, who had no authority to grant such acquittance. The plaintiff alleged that he became aware of this proceeding on the 8th of October 1870. He then refers to a previous suit brought by him on the 26th of June 1871. That suit, we may observe, was withdrawn under the provisions of Section 97 of Act VIII of 1859. A very large sum was expended in the way of costs in that suit, amounting to upwards of 10,000 rupees, and the suit was allowed by the Subordinate Judge to be withdrawn on the simple ground that Mr. Gibbon was about to go to England for six months, and that he was obliged to withdraw the suit as there was nobody in the country capable in his absence of looking after the exigencies of that particular suit. The plaint further states that the defendant, although repeatedly called upon to furnish accounts, put off the plaintiff with promises, and at last on the 15th of June 1873, he declined to execute any ekrarnamah to submit an account, although he had previously promised to do so. The plaint is verified by Mr. Gibbon, not in his capacity of manager of the Raj and Reasut, but as manager of the Bettyah estates alone.

The written statement of the defendant Bukhtar Tewary in so far as it is material to the points before us is briefly as follows: that the Kooer has now come of age, and that the certificate under Act XL of 1858, which was granted to Gibbon not as the guardian of the person of the minor, but as guardian of his estates (he not being capable of being the guardian of his person inasmuch as his father was alive), had become inoperative, and that Mr. Gibbon who is a stranger had no right to institute this suit or to verify the plaint; that Gibbon not being the real plaintiff, the suit cannot be maintained. Then there is an allusion to the plaintiff not being the trustee of the son of the Maharajah, and that his plaint and verification are inconsistent one with the other; that the suit to set aside the farkhuttee of the 26th of June 1870 executed by the Maharajah of Bettyah, without making that gentleman a party, cannot be maintained. There is also a further objection to the date of the farkhuttee being assumed as the date of the cause of action. The rest of the written statement touches upon the merits of the case which have not been entered into by the Court of first instance.

The issues laid down by Mr. DaCosta, the Subordinate Judge, are—1st, Has the plaintiff a right of action; 2nd, Whether the suit is multifarious; 3rd, Is the plaint obscure and irregularly drawn; 4th, Whether the law of limitation bars the suit. On the 1st issue in bar, Mr. DaCosta in a decision dated the 2nd of September 1873 was of opinion that Mr. Gibbon had no right of action to sue in his own name, inasmuch as he has no personal interest in the subject-matter of the suit; that under Sections 16 and 17, Act VIII of 1859, an agent cannot sue in his own name although he may hold from his principal a power of attorney to sue and be sued. In support of this opinion, the Subordinate Judge refers to a decision of this Court, dated the 8th of February 1868,* and then he observes that in the present case the plaintiff admits that Maharajah Kooer Hurender Kishore Singh whose agent he is lives within the jurisdiction of the Court and is now an adult, and consequently that the action of his agent cannot legally be admitted on his behalf in this suit. On the 2nd issue, he finds in favor of the plaintiff. On the 3rd issue in bar, the Subordinate Judge found that the plaint is obscure and irregularly drawn. We may observe on this point that this finding is come to after he had examined and directed the plaint to be registered. On the 4th issue in bar, the Subordinate Judge found further that the present suit is instituted on the 21st June 1873, being nearly four years after the date of the admitted demand under the perwannah of the 25th of June 1869, and the Subordinate Judge is of opinion that Section 30 of Act VIII of 1869, the present rent law, applies to this case that the plaintiff having admitted that the defendant was dismissed from the 26th of June 1870, the agency having determined from that date and more than year having elapsed previous to the institution of the suit, the suit was barred. Then the Subordinate Judge says, that if, for the sake of argument, the case be held to come under the three years law of limitation, as argued by the pleader for the plaintiff, even then he finds that limitation would bar the suit, for from the date of

* 9 W. R., 254.

Digitized by Google

the plaintiff's demand on the 26th June 1870 three years had more than elapsed when this suit was instituted on the 21st of June 1873. The suit was therefore dismissed with costs.

The first point we have to consider is whether this suit can be instituted by Mr. Gibbon as manager of the Bettyah Raj and trustee of Maharaj Kooer Hurender Kishore Singh Bahadoor or not. If Mr. Gibbon has any *locus standi* whatever in this Court it is under the provisions of the ekrarnamah to be found at page 15 of the printed book. and it appears to me, speaking for myself, that this suit on the part of Gibbon has been brought as a tentative one to have the question decided whether under the terms of this ekrarnamah he is entitled to remain in his office as manager of this estate, now that the Kooer has admittedly come of age. The condition under which Mr. Gibbon alone can claim to continue as the manager of this estate after the Kooer has come of age is the second condition of the ekrar to be found at page 16 of the printed book. That condition runs thus :—"Even on the arrival "at majority of the Raj Coomar (may God "prolong his life) till my life," the life of the Rajah, "the aforesaid committee shall stand and remain intact, and if my life be at an end during his minority, and I fail to make any one my successor as member of the committee, the first member, *i. e.*, the aforesaid Maharajah Sree Kashee Nuresh Bahadoor shall also be my successor, and shall possess the power of two members." We do not think it necessary in this suit to put any construction upon this ekrarnamah. This being a suit brought by Gibbon against a servant of the Rajah of Bettyah for an account we think it would be wrong for us to put any construction upon this ekrarnamah, more particularly as the parties most concerned are not before the Court, namely, the Kooer and the Maharajah of Bettyah. The present suit is confined to personal property, and does not refer to the immoveable property. The personal property of the Maharajah of Bettyah may or may not have passed under the ekrarnamah under which he relinquishes the whole of the estate to his son, and it is consistent with the Mitakshara law by which the family is governed that the personal property should remain in the possession of the father, the Maharajah. It is also clear from the action of Mr. Gibbon himself at page 85 of the printed book that in matters of this description, namely, in the matter of taking an account of the personal property of the Rajah, the Maharajah was consulted by Mr. Gibbon. Mr. Gibbon in his roobakaree dated the 15th of April 1870, which is to be found at page 85, directs that a copy of his proceeding which had for its object the calling upon Bukhtar Tewaree to furnish accounts be submitted to the Rajah for approval. Therefore it is clear to me that in matters relating to the personal property belonging to the Rajah, he had to consult and obtain the approval of the Rajah of Bettyah before taking any steps against the servants of the Rajah for an account. At page 84 there is the perwannah referred to, in which also the permission of the Maharajah of Bettyah is alluded to. Then at page 53 we find a proceeding of the Maharajah of Bettyah in which he states that Bukhtar Tewarree having filed his resignation of his duties connected with the personal expenses of the said Maharajah, this proceeding be sent to Mr. Gibbon, the manager, and he was informed that the Rajah had permitted Bukhtar Tewaree, the defendant in this case, owing to his advanced age, to resign the duties connected with the personal expenses of the Maharajah. Then we find that in the former suit which was brought substantially for the same subject-matter as the present suit (see page 60 of the printed book) Mr. Wright in his decision states that the Maharajah of Bettyah had declared that he had no claim against the defendant Bukhtar Tewaree. It therefore seems to me that we ought to be very careful in a case of this description where it is improbable that the real principal would have taken any proceedings, or that he had reason to believe that there was any grievance to complain of, before we permit a person in the position of Mr. Gibbon to bring a suit of this description. A mookhtarnamah to be found at page 24 was alluded to by the learned Advocate-General in the course of the argument as giving Gibbon full authority to bring the present suit, but as already observed the only *locus standi* that Gibbon can have in this suit is under the ekrarnamah. He was one of the members of the committee appointed under that deed, and that deed provides that the affairs of the Rajah of every description are to be conducted according to the decision of the majority of the committee. Now it is clear in this case that the Rajah of Benares has given no consent to this suit, and the Rajah of Bettyah, as already shown, in the former suit distinctly stated that he had no claim against the defendant Bukhtar Tewaree. There is, therefore, no authority either from

Digitized by Google

the Rajah of Benares or from the Rajah of Bettyah authorizing Mr. Gibbon to bring the present suit. I therefore think that the present suit and this appeal must be dismissed.

With reference to the question of limitation, although it is perhaps not necessary to enter into that question, inasmuch as I think that the present suit cannot be brought by Mr. Gibbon, I would remark that I cannot concur in the finding of the Subordinate Judge on the question of limitation, inasmuch as I think that the Subordinate Judge ought to have inquired into the allegation in the plaint as to the defendant having promised on various occasions to file accounts and having refused to do so on the 15th of April 1870. With these remarks I dismiss the plaintiff's suit, and this appeal with all costs payable by the plaintiff.

Birch, J.—I concur in thinking that the suit should be dismissed.

The 1st February 1875.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble E. G. Birch, *Judge.*

Government—Auction-Purchaser — Cancellation of Tenure—Reg. XI of 1822.

Regular Appeals from a decision passed by the Officiating Subordinate Judge of Tipperah, dated the 4th August 1873.

Case No. 246 of 1873.

Kazee Moonshee Aftabooddeen Mahomed (Defendant) *Appellant,*

versus

Sanioollah (Plaintiff) *Respondent.*

Mr. Macrae for Appellant.

Baboos Sreenath Dass and *Mohinee Mohun Roy* for Respondent.

Case No. 250 of 1873.

Sanioollah (Plaintiff) *Appellant,*

versus

Kazee Moonshee Aftabooddeen Mahomed (Defendant) *Respondent.*

Baboos Sreenath Dass and *Mohinee Mohun Roy* for Appellant.

Baboo Lulleet Chunder Sen for Respondent.

Where the Privy Council, in the case of Khaja Asanoollah *vs.* Obhoy Churn Roy, recognizing that the Government had, as the auction-purchaser at a sale for arrears of revenue, the option of cancelling and avoiding the talookdaree tenure in that case, ruled that it was incumbent on Government to take some clear step for the purpose of declaring the avoidance or cancellation of the tenure, and finding that the Government had not exercised that power, declared the under-tenant entitled to retain possession of his land during the subsistence of his tenure, HELD that the decision did not apply to a case in which the proceeding of Government showed that it had exercised the power of cancellation:

HELD also that the indulgence in that case, referred mainly to tenures purchased between 1817 and 1822 but not to tenures created after Regulation XI of 1822, had informed persons that their rights were liable to be cancelled by a purchaser at an auction sale for arrears of revenue.

Couch, C. J.—THE plaint in this suit states that on the 18th of Aughraun 1237 Mahomed Safee obtained from the zemindar of the 8 annas share of Pergunnah Buldakhal a miras talook, consisting of a 2 annas share in the names of himself and his brothers; that the revenue of the zemindaree of the aforesaid share having fallen into arrear, it was sold by auction and purchased by the Government; that the Government acknowledged and confirmed the talookdaree right, and allowed a settlement of it to Mahomed Safee who was the person really interested, his brothers, whose names appeared with his, having no interest in the talook; that the Government also granted an ijarah of another share consisting of 12 annas to Mahomed Safee and Khan Mahomed; and that the revenue authorities having ordered the 2 annas and the 12 annas shares to be let jointly, a putnee talookdaree settlement of both the shares was made with the said Mahomed Safee and Khan Mahomed for 17 years commencing from 1252. It is then alleged that Mahomed Safee died, and that his son Imam Buksh owned and held possession of the 9 annas 10 gundas share of the property left by his father, and that Khan Mahomed owned and held the remaining 4 annas 10 gundas; that the plaintiff purchased at an auction held in execution of a decree the 9 annas 10 gundas share, and that afterwards Khan Mahomed having died, the plaintiff obtained a settlement of the 14 annas. We may say at once that the plaintiff has not shown that he in any way became entitled to the share of Khan Mahomed, and the question is as to the portion which he alleges he bought under the execution of the decree against Imam Buksh. The plaintiff then alleges that the defendant brought a suit against him under Section 15 of Act XIV of 1859 and got possession of the property, and that consequently he, the plaintiff, has been dispossessed, and so he brings the suit.

The defence, as stated in the second paragraph of the written statement, is this—"As

Digitized by Google

"the case which was instituted by the plain-
"tiff under Act X of 1859 for possession
"of property bore resemblance to the present
"suit and was based on the same cause; and
"as that case was dismissed and the decision
"of it has become final, the present suit is
"barred by Section 2 Act VIII of 1859."
It is not shown in support of this defence that there was a decision in the suit referred to. It appears from the proceedings in it which have been filed in this suit that a plaint was filed and also a written statement, but there is not before the Court any decision of the suit. We must dispose of the question thus raised upon the materials that have been placed before the first Court and which have come up to this Court. And we cannot say that there has been any determination in the former suit of the cause of action. The suit was one in which if there had been a determination it would have been a bar to the present suit; for it was a suit brought in 1864 by the plaintiff to obtain possession, and if it was dismissed on the merits, it would have been a determination that he had not a right to recover the property.

The other defence is that the 2 annas of the talook which was said to have been, and which was, created in 1237, had been put an end to or extinguished by the proceedings of the Government upon its becoming the purchaser at a sale for arrears of revenue. And the question between the parties as to the 2 annas is this: the plaintiff contends that the Government, instead of extinguishing the talook and rendering it void, which as the purchaser it had power by law to do, recognized its continued existence; and not only did that, but joined with it the 12 annas which it was admitted was khodkasht, and created a talook of 14 annas, from which the plaintiff could not be dispossessed by the person who purchased from the Government, namely, Khajah Asanollah.

The Subordinate Judge who tried the suit has come to the conclusion that as to the 2 annas share the case of the plaintiff is right, but he has decided against him as to the 12 annas, and has not acceded to the contention of the plaintiff that the 2 annas and the 12 annas were not to be separated, and that the whole had become his talook.

From this decision there are two appeals. The defendant says that the Subordinate Judge is wrong as to the 2 annas, and that the suit ought to be dismissed. The plaintiff says that he is wrong as to the 12 annas, and that he ought to have had a decree for the whole.

The question then upon the merits which we have to decide is, what was done by the Government upon its becoming the purchaser at the sale for arrears of revenue.

We have now before us the proceeding of the Collector of the 19th February 1836, which was soon after the Government became the purchaser. There were two purchases; one in January 1835, and another in May 1836. The lands in question seem to have been purchased in January 1835. On the 13th of February 1836, there is a proceeding before the Collector, which is called a "suit for assessment of rent on a "talook called after the defendants in "2 annas share of Mouzah Neej Debi Dowar, "2 annas share of Mouzah Baleebaree, "2 annas share of Mouzah Hamunbaree, and "2 annas share of Mouzah Babunbaree, "appertaining to 8 annas share of the said "Pergunnah,"—this having before been said to be Pergunnah Buldakhal. The defendants named are Mahomed Safee, Shuker Mahomed, and Mahomed Ali, three brothers; and after reciting the different proceedings which had been taken by the parties, the judgment of the Collector is in these words:—"Therefore "the talooka in question and its final jumma, "created as they have been recently, subse-"quent to the conclusion of the decennial "settlement, by the late zemindars, are liable "to be annulled under the provisions of the "Section quoted above, and Section 5, Regu-"lation XLV of 1793, reduced into clear and "specific law by Section 14, Regulation I of "1801, Section 4 of Regulation IX of 1812, "Section 2 of Regulation VIII of 1819, and "Sections 29 and 31 of Regulation XI of "1812. It seems fit and proper to make "jummabundee or assessment thereof under "Section 36, Regulation XI of 1822, Clause "2, Section 2, and Section 5 of Regulation "IX of 1825."

The Section referred to as before quoted is Section 32 of Regulation XI of 1822 which provides that in case it should come to light that the former zemindars had, either through favor or on receipt of any bonus, granted a *punchuk* pottah at a low rent to anybody, the auction purchaser shall have power and authority to cancel it and to assess rent agreeably to the usage and rates obtaining in the Pergunnah.

The judgment continues:—"It is therefore "ordered that the said talooka be annulled

Digitized by Google

"and its fixed rent cancelled, that its assess-
"ment be made agreeably to the rates and
"usage prevalent in the Pergunnah. Should
"the defendants be dissatisfied with my order
"they are at liberty to appeal to the Com-
"missioner under Section 2 of Regulation III
"of 1828."

On the 19th of February 1836, there is another proceeding before the same gentleman, Mr. Alexander, the Officiating Collector, which he describes as a "suit to assess rent "on a talook named after the defendants, "in 2 annas share of Hola Debi Domaz, "appertaining to the 8 annas share of the "said pergunnah under Regulation IX of "1825." He says, "the record of the case "was laid before me. None of the defend-"ants appeared either in person or by "mookhtar, although thrice called out in a "loud voice," and stating what had been done, and the papers that had been read before him, concludes with saying :—"In this "view it seems fit and proper to assess a "rent of Rs. 200, leaving profits for the "talookdar, and allowing collection and "other charges. It is therefore ordered that "the annual jumma of this talook be fixed "at Rs. 200 and that a notice of it under "Section 9 of Regulation V of 1812 be "issued to the defendants. In case the "defendants appear and accept the jumma "assessed by me, a settlement thereof be "concluded, by adding batta of sicca rupees "to the current coins which pass by the "name of Company's Rupees, as directed by "the Accountant-General."

The next document in the case, and upon the construction of which the plaintiff has founded his claim, is one of the 15th of September 1845, before Mr. Metcalfe, the Collector. It is headed "In the matter of settlement of Jowar Debidar appertaining to Burra hissa, Pergunnah Bulda khal, the auction-purchased zemindaree of Govern-ment," and begins thus:—"Before this, during "the time of the former Collector, a 2 annas "share of the said Jowar settled with "Goluck Chunder Kur and 2 annas share "with Mahomed Safee in talookdaree, and "a 12 annas share, with the aforesaid Maho-"med Safee and Khan Mahomed in ijarah "settlements, and the same were confirmed "by the Commissioner: subsequently after "obtaining orders from the Commissioner for "making a settlement of the entire mehal "jointly, the present Collector addressed the "letter No. 154 dated the 16th July last to "the Commissioner stating that a 12 annas "share of the said Jowar was settled in "ijarah and a 4 annas share in talookdaree "and requesting to know how an ijmalee "settlement thereof could be made. There-"upon letter No. 563, dated the 22nd July, "was received from the said officer with "these directions, *viz.*, that the 12 annas "share also should be settled in talookdaree "with the three persons who obtained the "settlement, if they are willing to enter "into a talookdaree settlement jointly; but "if Goluck Chunder Kur, the proprietor of "the 2 annas share, be unwilling to enter into "such a settlement, a separate settlement "should be made with him, and that the "14 annas share should be settled in talook-"daree jointly with Mahomed Safee, the "talookdar of the other 2 annas and the "ijardar; but if Mahomed Safee also be "unwilling to enter into such a settlement, "then there is no other course to be followed "in this matter, and the settlement which "has already been made shall continue in "force." Notice was given to the parties to appear, and Mahomed Safee and Khan Mahomed appeared in person, and their state-ments were taken. They stated that "they "are not willing to give the said Goluck "Chunder a share of the 12 annas, of which "an ijarah settlement was concluded and take a "joint talookdaree settlement, and that they are "willing to take a joint settlement, if it be "mentioned at the top that Mahomed Safee's "2 annas share and the aforesaid 12 annas, "in all 14 annas share is their putnee "talook, and 2 annas share the putnee talook "of Goluck Chunder Kur, or if the afore-"said 12 annas be separately settled with "them in ijmalee, they would agree to that "also; and, that if this be not done, the "former settlement be allowed to stand." The proceeding then recites that "in the "English letter of the Commissioner, there "is no order that an ijmalee settlement be "made by giving a portion of the aforesaid "12 annas share to the said Goluck Chunder; "but, on the contrary, as it has been clearly "stated therein, that the ijarah settlement "made in respect of the said 12 annas "share be not at present interfered with, a "portion of the 12 annas share cannot, "under these circumstances, be in any way "given to Goluck Chunder. As Mahomed "Safee and Khan Mahomed are willing to "take an ijmalee settlement of the 2 annas "(share) of the said Mahomed Safee and "12 annas of the ijarah, in all 14 annas "share, and as the said Goluck Chunder does "not agree to take an ijmalee settlement "unless the said 12 annas share be divided,

Digitized by Google

"therefore, agreeably to the order of the "Commissioner, it is deemed proper to keep "the 2 annas share of Goluck Chunder "distinct, and to make an ijmalee talook-"daree settlement of the remaining 14 annas "with Mahomed Safee and Khan Mahomed. "It is, therefore, ordered that the settlement "with Goluck Chunder Kur of the 2 annas "remain as before, and that 2 annas share of "Mahomed Safee and 12 annas of the ijarah, "in all a 14 annas share, be jointly settled "as talook with Mahomed Safee and Khan "Mahomed for a period of 17 years from "1252, and that dowl, kabooleut, and kist-"bundee be duly taken from them."

This raises the question between the parties. The plaintiff contends that the words "the 14 annas share be jointly settled as talook for a period of 17 years," do not mean that at the end of that time the right thus created was to cease, but that it was the creation of a talook, that the rent was to remain as fixed for 17 years, and the right which Government would have at the end of that period was not to remain in possession of the property, but only to raise the rent. Reliance was placed upon its being called a talook in this document, and also on the previous statements in it referring to the talookdaree right of Mahomed Safee in the 2 annas share and the use of the word Malikana.

If we had nothing but this paper before us, and were not informed of the previous proceedings of the Government, there might be some foundation for this; but the proceedings to which we have referred show that the Government having the undoubted right to avoid the talook which had been created by the zemindar, did, as far as language can be used to show what was the intention of the Government proceedings in 1836, annul the talook of the 2 annas. The Government officers appear to have considered that Mahomed Safee, who had been the owner of the 2 annas share of the talook, had some claim to the settlement which was going to be made, and that the person who held the 12 annas share had some claim, and the Government gave them, as it had power to do, the option of taking a settlement of the 2 annas share, which had been Mahomed Safee's talook, and the 12 annas which was khodkasht. The parties appear to have agreed to this, and we think that the object of the stipulation that it should be stated at the top of the paper that Mahomed Safee's 2 annas share and the 12 annas share were their putnee talook, was only to show in what way these two persons had obtained the settlement.

Probably what the plaintiff is now contending for would not have been put forward, if there had not been the decision of the Privy Council in the case reported in XIII Moore's Indian Appeals, page 317, Khaja Asanoollah against Obhoy Churn Roy,* which was a suit relating to a talook situated in the same pergunnah. Then their Lordships said that, recognizing that the Government had, as the auction-purchaser at the sale for arrears of revenue, the option of cancelling and avoiding the talookdaree tenure in that case, which was similar to the tenure here, it was incumbent on the Government in the particular case to take some clear step for the purpose of declaring the avoidance or cancellation of the tenure; and they proceeded to consider whether the Government had, in fact, in the case before them, exercised that power whilst it was capable of doing so, and came to the conclusion that the Government had not exercised it. But in that case the conduct of the Government was different from what it has been in the present. There were no such proceedings as those in this case which we have referred to, that is to say, a proceeding instituted by the Government before the Collector for the purpose of avoiding the talook, and a decision by that officer ordering that the talook be annulled. We need not go into the details of the case before their Lordships. An examination of them shows that the Government, so far from acting in that case in the way in which it appears to have done in this, showed an intention not to cancel the talook, but to keep it in existence and to allow the talookdar to continue.

And when we look at the grounds of the decision, it is clear that the judgment is not an authority for deciding the present case in the plaintiff's favor. Their Lordships, after referring to Mr. Colvin's letter printed in the paper book of the Appeal No. 718 of 1865 as being the best evidence that they could have of what the Government in Februray 1836 intended to do with regard to the dependent talooks forming part of this estate, say:—"Nor is it possible to read the last paragraphs of that letter, beginning with the 52nd, without coming to the conclusion that it was then the intention of Government, whatever might be their extreme rights, to make settlements with the talookdars of all

* 13 W. R., P. C., 24.

Digitized by Google

classes, putting them, or at least all who were not specially protected against enhancement of rent, in the position which they would have held of right before 1822, *viz.*, that of under-tenants entitled to retain possession of their lands during the subsistence of their tenure, subject to the condition of having their rents enhanced, according to the pergunnah rates. The letter, no doubt, contemplated the exercise of the extreme rights of Government if the talookdars should not, within a certain time, enter into the new settlement. But the primary object of Government was to settle with the talookdars; and, if the settlement were made, the tenures would continue to exist, though as talooks held at variable instead of fixed rents."

The 53rd paragraph of Mr. Colvin's letter is in these words:—"But the desire of the "Board to act with indulgence to all these "talookdars has been before more fully stated. "And there is this circumstance in their "situation which adds greatly to their claim "to equitable consideration, that their tenures "were all purchased by them at a time "(between 1817 and 1822) when under the "law as it was then understood, they were "led to look upon their right of possession "in their lands as fixed and permanent, "notwithstanding a sale of the estate for "arrears, in the event of their agreeing to "the renewal of engagements in regard to "rent, at the rates prescribed. It is reasonable to suppose that they paid an enhanced "price for the increased value which must "have been borne by their tenures, while "this important condition attached to them."

It appears from this that the desire of the Board of Revenue to act with indulgence was with reference mainly to tenures which had been purchased between 1817 and 1822,—tenures created before the Regulation of 1822, i.e., at a time when the parties might suppose that their rights were to be permanent. Here the right was created in 1830, after the Regulation of 1822 had informed persons that such rights were liable to be cancelled by the purchaser at a sale by auction for arrears of revenue. The reason given by their Lordships for the view which they took of the case then before them apply to tenures created before 1822. We must, however, notice that the tenure in the case before the Judicial Committee was, like the tenure in this, created in 1830; but the attention of their Lordships does not appear to have been called to that. It would seem that the reasoning in the judgment founded upon Mr. Colvin's letter would not apply to it. But the judgment of the Judicial Committee was founded also upon the proceedings which the Government had taken, from which it was inferred that it had not exercised the power of cancellation whilst it was capable of doing it. The distinction between the case before us and the case before the Judicial Committee is that it appears upon the proceedings which we have now before us that the Government did exercise the power of cancellation. Construing, as we think we ought, any ambiguity of language in the grant for 17 years which was made in 1845 by the light which is afforded by the previous proceedings of the Government, we think we cannot hold that it is to be construed in the manner which the plaintiff contends for. And at the end of the 17 years, instead of insisting upon the right which the plaintiff now claims, the parties appear to have taken another lease for a year. This conduct appears to us to be in accordance with the construction which we think we should put upon the document.

The division which the Subordinate Judge has made of the property, treating it as a grant of the 2 annas as the old talook, and a lease of the 12 annas, cannot we think be supported. The intention obviously was to make one estate of the 14 annas share, and the parties were to take it as one estate. If the plaintiff could have made out that it was intended to recognize him as being still the ancient talookdar, he would have had as good a title to the 12 annas as to the 2 annas. We think that the Subordinate Judge was wrong in the view which he took of the 2 annas. His decision as to the 12 annas was right, and he ought to have come to the same decision as to the 2 annas. Consequently his decree, in so far as it relates to the 2 annas share, will be reversed, and his decree as to the 12 annas will stand.

The appeal of the plaintiff as to the 12 annas will be dismissed with costs, and in the appeal of the defendants the decree of the Subordinate Judge will be reversed with costs of the appeal. The result is that the whole of the plaintiff's suit is dismissed with costs.

Digitized by Google

The 1st February 1875.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble E. G. Birch, *Judge.*

Special Appeal.

Appeal under Section XV of the Letters Patent, from a decision passed by the Hon'ble F. B. Kemp, one of the Judges of this Court, on the 8th September 1874, *in Special Appeal No.* 225 *of* 1874, *from a decision passed by the Subordinate Judge of Tipperah, dated the* 3*rd November* 1873, *modifying a decision of the Moonsiff of that District, dated the* 30*th November* 1872.*

Himmut Ali Khadim and others (Defendants) *Appellants,*

versus

Nyamutoollah Khadim and another (Plaintiffs) *Respondents.*

Moonshee Serajul Islam for Appellants.

Baboo Grish Chunder Ghose for Respondents.

The construction of the deposition of witnesses is not a question of law, and therefore not a ground of special appeal. Nor is it a ground of special appeal that the Court has not passed an opinion on the report of an Ameen. But where an assumption is made by the Court without any evidence, that is an error of law warranting a special appeal.

Couch, C.J.—In this case the Moonsiff made a decree in favor of the plaintiff as to the whole of the land which is the subject of the suit. The Subordinate Judge, on an appeal to him, reversed that decree in part, and gave to the plaintiff a decree for a portion of the land claimed. The grounds of special appeal are three:

1*st.*—"That the Lower Appellate Court is "wrong in its construction of the deposition "of the four witnesses adduced by your petitioner, when it holds that the entire portion "lying in the south is khila land, inasmuch "as they distinctly state that some part of "southern portion of the disputed land was "khila, and was in the possession of your "petitioner before dispossession.

2*ndly.*—"That the Lower Appellate Court "is wrong in holding that the survey map "was not a sufficient evidence of title and "possession, and in drawing inference against "its *bona fides* in the absence of any evi-"dence thereto.

3*rdly.*—"That when the first Court, in "giving a decree to your petitioner, based "its decision upon the oral evidence, survey "map, and the report of the Ameen, the "Lower Appellate Court, before modifying "the decree of the first Court, should have "passed its opinion on the said report."

The first of these grounds appears, on the face of it, not to be a ground of special appeal. The wording of it shows that the objection is that the Lower Appellate Court has not taken the view of the evidence which the appellant thinks it ought to have taken. It is altogether improper to say that the construction of the depositions of witnesses is a question of law. The construction of the deposition of a witness is what the Court thinks is proved by it. It is a misapplication of the term to speak of it as a construction so as to make it a question of law.

As to the second ground, namely, that the Lower Appellate Court was wrong in holding that the survey map is not sufficient evidence of possession, the statement of it shows that what is meant is that the Lower Appellate Court has not given to the survey map as evidence the effect which the appellant thinks it ought to have. A survey map is not conclusive evidence of possession: it may be used as evidence of it, but its value depends on the circumstances under which it is made. It may be, as is supposed by the Moonsiff, that it was made under circumstances which make it of no value; but whether it is so or not is not a question that can be raised in a special appeal. Nor is the third ground one which would justify this Court in reversing the decision, it being that the Appellate Court ought to have passed its opinion upon the report of the Ameen. It is not a ground for a special appeal that the Appellate Court has not passed its opinion upon it.

But the learned Judge who heard the special appeal points out what is a substantial objection to the judgment of the Subordinate Judge. He says that the Subordinate Judge has assumed that there were two plots of land, and has given a decree to the plaintiff with reference to the plot to the south. And when the learned Judge says, 'from what evidence I am unable to understand,' I understand him to mean that there was no evidence that could be the foundation of such an assumption; that the Subordinate

* 22 W. R. 519.

Digitized by Google

Judge has, without there being any evidence that it was the fact, treated the piece of land, which is the subject of the suit, as if it consisted of two plots, and in that way has given a decree to the plaintiff for a part, leaving the remainder in the possession of the defendant. We think that is an error in law which justified the learned Judge in reversing the decree of the Subordinate Judge. We are, therefore, of opinion that we ought not to interfere with his decision, and should dismiss the appeal with costs.

The 1st February 1875.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble E. G. Birch, *Judge.*

Agreement—Objection—Appellate Court.

Case No. 149 of 1873.

Regular Appeal from a decision passed by the Officiating Judge of Hooghly, dated the 31st December 1872.

Hureehur Mookerjee (Defendant) *Appellant,*

versus

Raj Kishen Mookerjee (Plaintiff) *Respondent.*

Baboo Gopal Lall Mitter for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

Where no objection is taken before the first Court to an account which is there prepared as agreed to by both parties, it cannot be taken in the Appellate Court.

Couch, C.J.—THIS regular appeal came on for hearing before Mr. Justice Ainslie and myself with special appeal No. 1458 of 1873.* The substantial question between the parties was raised in the special as well in the regular appeal, it being the construction of a deed of gift from the plaintiff to the defendant, who are father and son; and by our judgment in the special appeal we decided what was the construction. This being in favor of the plaintiff, the special appeal was dismissed. But an objection was taken in the regular appeal that the Judge in determining what should be allowed for the contribution of the defendant in respect of the year 1277, had taken into consideration the income of the previous year, 1276, instead of 1277; and upon what appeared to us in the proceedings in the suit, there was a foundation for the objection. Consequently we directed that the Judge should take the account for the year 1277, finding what was the amount of the income of each party from the estate in that year. The Judge has now done this, and some objections have been taken to the account which the defendant made out. They relate to mistakes in calculation which might, and no doubt, would have been corrected by the Judge if an application had been made to him for that purpose. We have been asked to do nothing more than correct these mistakes; there is no ground for our doing more than that, and the alteration of the decree is comparatively trifling in amount.

But this is not the only matter which has to be considered when we are disposing of the costs of this appeal. The Judge says (and no attempt has been made to contradict it, and we have no doubt of its correctness)—"Having carried out the "orders of the High Court, I feel it my duty "to state for the consideration of the Honor- "able Judges before whom this case may "come, that in the trials both of this case "as an original suit and of the appeal from "the order of the Subordinate Judge heard "by the High Court on special appeal, "not only was no objection taken before me, "but it was accepted by the pleaders of "both sides that the household, &c., expenses "of the year could not be placed against "the income of the same year, because from "the nature of zemindaree accounts the "income could not be detained until four or "five months of the following year had ex- "pired when the 'Poonnia' would take place. "This objection was, it is true, taken in the "contra-statement of the defendant, but it "was never pressed in this Court, and as I "have already stated the account was pre- "pared as agreed on by the parties."

If we had known this when the regular appeal was before us, we should certainly not have allowed the further enquiry. If the pleaders agreed in the way here stated, which was a reasonable thing for them to do, it was most improper on the part of the appellant to take such an objection to the decision of the Judge, and the regular appeal would have been dismissed with costs as the special appeal was. We cannot suppose that the plender who appeared in this Court

* *Ante*, p. 236.

Digitized by Google

had any knowledge of what had been done in the lower Court. It was probably kept back from them.

The decree appealed from will be amended by substituting the sum of Rs. 10,684 for the sum which was decreed by the District Judge to be paid, but as the appellant has succeeded in this comparatively trifling alteration in the amount, we think he ought to pay the costs of the appeal which was unnecessary, and we order them to be so paid.

No order was made in regard to the costs of the special appeal. We think that the appellant should now be made to pay those costs, and we order accordingly.

The 1st February 1875.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Certificate of Administration—Act XXVII of 1860—Act X of 1865 s. 187.

Case No. 300 of 1874.

Miscellaneous Appeal from an order passed by the Officiating Judge of Dinagepore, dated the 27th April 1874.

Kristo Chunder Mookerjee (Petitioner) *Appellant,*

versus

Chundee Pershad Banerjee (1st Objector) *Respondent.*

Baboo Kristo Komul Bhuttacharjee for Appellant.

Baboo Gopal Lall Mitter for Respondent.

Semble:—The grant of a certificate under Act XXVII of 1860 on the title afforded by a will, which gives the grantee the estate in respect of which the debts accrued, does not establish a right as executor or legatee within the meaning of the words of s. 187 of the Succession Act.

Phear, J.—We think that the order of the Judge ought not to be disturbed, and that this appeal must be dismissed.

It has been objected before us that the Judge was wrong in granting the certificate to the respondent merely on the title which was furnished by a will, that will not being evidenced by probate. It was said that Section 187 of the Succession Act, which is made applicable in the case of wills of Hindoos by Act XXI of 1871, prevented the respondent from making out a right to the certificate on the footing of the will in any other way than by producing the probate or letters of administration with the will annexed. The words of the Section are:—"No right as "executor or legatee can be established in "any Court of Justice, unless a Court of "competent jurisdiction within the province "shall have granted probate of the will "under which the right is claimed, or shall "have granted letters of administration "under Section 180."

But it seems to us, as at present advised, that the grant of a certificate under Act XXVII of 1860 to an applicant on the title afforded by a will which gives him the estate in respect of which the debts accrued, does not establish a right as executor or legatee within the meaning of the words of this Section. It is not, however, necessary for us to judicially determine this question, because the appellant's only right to appear in this case at all is founded upon a will of which he has not taken out probate, nor has he obtained letters of administration of the estate with the will annexed. If, therefore, his objection to the right of the respondent be well founded, he himself also has no right in the matter, and cannot be heard against him. We think that the objection to the granting of the certificate which was founded upon the nature of the evidence in the case cannot be sustained.

We, therefore, dismiss the appeal with costs.

One gold mohur is allowed for pleader's fees.

Digitized by Google

The 2nd February 1875.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Res Judicata—Khas Possession—Rent.

Case No. 2919 of 1873.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 10th July 1873, affirming a decision of the Moonsiff of Buxar, dated the 31st March 1873.

Bhugwan Doss (Defendant) *Appellant,*

versus

Sheo Narain Singh and others (Plaintiffs) *Respondent.*

Baboos Hem Chunder Banerjee and Mohinee Mohun Roy for Appellant.

Baboo Mohesh Chunder Chowdhry for Respondents.

A suit for khas possession is not a bar to a later suit for rent of the same land.

Birch, J.—THIS case has been argued before us at some length, but the argument may be condensed into two points. The first objection raised here is that, inasmuch as the defendant has never paid rent, the relation of landlord and tenant does not exist between the parties, and the suit ought to have been thrown out. It has been found by the Courts below as a question of fact that the lands in dispute were zeraat lands, and that when they were held as such by the proprietor, they were rated at one rupee per beegah. The defendant's answer amounts to this, that he is entitled to hold these lands without paying any rent for them. The Lower Courts have held that the defendant is liable for the rent at which these lands were assessed at the time that his predecessor remained in possession of them as his zeraat lands, and the finding of the Lower Courts on this point cannot be impeached as erroneous in law.

On the second objection that the suit is barred by a previous adjudication,—upon looking into the former case we find that this objection cannot prevail. The former suit was for khas possession. The defendant then pleaded in bar of this possession that he held the land under a mortgage, and in that case it was only decided that the plaintiff could not, under the then existing circumstances, obtain khas possession of the land. Having failed in his suit for khas possession, the plaintiff now sues for rent. It has never been held that the defendant's land was not part of the rent-paying land of the village, and there can be no doubt that the Lower Courts are justified in saying that the defendant is liable for the rent for which he has been sued.

The special appeal must be dismissed with costs.

[PRIVY COUNCIL JUDGMENT.]

The 3rd February 1875.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague Smith, and Sir Robert P. Collier.

Religious Endowments — Debts incurred by Shebaits—Decrees—Fraud—Collusion.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Prosunno Kumari Debya and another

versus

Golab Chand Baboo.

In a suit to set aside two decrees, which declared that certain bond-debts, incurred by the Shebait of an idol, should be realized from the rents or profits of the dewuttur mehal, it was held that the High Court was right in holding that, in the absence of proof of fraud or collusion, it could not re-open and review those judgments. It was held also that the Privy Council, since it was not sitting in appeal to determine whether the conclusions of fact or of law on which those decrees were founded were right or wrong, could properly deal only with the operation and effect of the decrees as they stood.

Notwithstanding that property devoted to religious purposes is, as a general rule of Hindoo law, inalienable, it is competent for the Shebait, in his capacity as Shebait and manager, to borrow money for the proper expenses of keeping up worship, repairing temples, defending litigation, and other like objects; but the power to incur such debts must be measured by the existing necessity for incurring them. And judgments obtained against a former Shebait in respect of debts so incurred are binding upon succeeding Shebaits.

THE appellants sued in the Court of the Judge of Zillah Dacca as Shebaits of an idol, called Lukshmi Narain Thakoor, to set aside two decrees, dated respectively the 27th February 1852 and the 25th July 1854, obtained by the respondent against their immediate predecessor, the Shebait Rajah Baboo; and to have the dewuttur property of

* From the judgment of Markby and Birch, JJ., decided on the 22nd May 1873,—20 W. R., 86.

Digitized by Google

the idol released from the attachment issued in execution of these decrees.

It was alleged in the plaint that the above decrees were obtained by fraud and collusion, and an issue was framed on this charge. The Zillah Judge gave a judgment on this issue, from which, although somewhat ambiguous and obscure, it may be inferred that he considered the charge of fraud had been sustained.

The High Court, however, on appeal, came to the distinct conclusion, and in their Lordships' opinion rightly, that this charge was unsupported by any evidence. The learned Counsel for the appellants having admitted at the bar that he could not on this point successfully impeach the judgment of the High Court, it is unnecessary to consider it further.

It should be observed *in limine* that the case does not come before their Lordships by way of appeal from the decrees sought to be impeached, but upon a fresh suit to set them aside.

The facts which led to the suit in which the first of the two decrees was obtained, are found in the judgment of the Judge of the Civil Court of Dacca. It appears that Rajah Baboo, who was a man of profligate habits, having spent the income of the dewuttur property on his own pleasures, borrowed 4,000 rupees from the respondent to defray the expenses of the worship of the idol, and of repairing the temple. As security for this advance he gave a bond to the respondent, and also a *rehinama*, by which he pledged the dewuttur property for the repayment of the borrowed money. In both securities it is stated that the money was borrowed for the service of the idol and the expenses of the temple.

The respondent brought his suit against the Shebait Rajah Baboo on these documents, and issues were raised and evidence gone into upon the question of fact, whether the money was *bonâ fide* borrowed and expended for the service of the idol; and also upon the questions of law, whether Rajah Baboo could pledge the dewuttur property for money so borrowed and expended, and whether the profits of it could be attached for payment of such a debt. It appears that the Principal Sudder Ameen gave the respondent a decree for the debt and interest, but ordered the amount "to be realized from such private property of Rajah Baboo as is not prevented from being sold by auction," intimating that the question whether the dewuttur property could be so sold might be determined at the time of the execution of the decree.

The present respondent appealed from this decision to the Zillah Judge. In disposing of the issue of fact, the Judge came to the conclusion that the money had been borrowed and expended for the service of the idol. On the other questions he held, first, in conformity with the opinion of the Pundit of the Court, that the *rehinama*, or specific pledge of the property, could not be enforced; but secondly, that a decree founded on the bond for the money so borrowed might be given, to be realized from the rents of the dewuttur lands. He accordingly so framed the decree.

The second decree now sought to be set aside was obtained in a suit instituted by the respondent in the Court of the Principal Sudder Ameen of Dacca against Rajah Baboo, on a bond for 2,700 rupees, given by him for money which the bond states was borrowed for the service of the idol, part of it being to defray the necessary expenses of a law-suit affecting the dewuttur lands. Issues were framed as in the former suit, with respect to the purpose for which the money was borrowed, and the liability of the dewuttur property to be attached for the debt. These issues the Principal Sudder Ameen found in favour of the respondent, and decided that the debt should be paid by Rajah Baboo, or else realized from the profits of the dewuttur mehal.

The above two decrees are entitled to the force due to judgments of competent Courts. The determination of the issues is *res judicata*, and their Lordships think that, in the absence of proof of fraud and collusion, the High Court was right in holding that it could not re-open and review the judgments founded upon them. Nor need their Lordships now say whether the Judge in the first case was right in holding upon the evidence of title before him that Rajah Baboo had no power to make a specific pledge of the dewuttur property, since they are not sitting in appeal to determine whether his conclusions of fact or of law are right or wrong. They can now properly deal only with the operation and effect of the decrees as they stand.

The question, however, how far these judgments are binding upon the appellants, the successors of Rajah Baboo, remains, and has been argued at the bar.

It was first contended that, according to the true construction of the decrees, they were *ex facie* intended to bind Rajah Baboo

Digitized by Google

alone, and not succeeding Shebaits; but their Lordships during the argument stated that in their opinion the plain meaning of the decrees was that the entire debts should be realized out of the profits of the dewuttur lands.

The main point for decision remains, whether these decrees can now be legally carried into effect, which raises the question whether the profits of dewuttur lands can be attached and appropriated during the incumbency of succeeding Shebaits by virtue of judgments obtained against a former Shebait in respect of debts properly and necessarily incurred by him for the service and benefit of the idol.

It is to be observed that the question is not raised whether the lands themselves could be sold under the decrees.

There is no doubt that, as a general rule of Hindoo law, property given for the maintenance of religious worship and of charities connected with it is inalienable.

In an appeal, which not long ago came before this tribunal, a question arose as to the validity of a grant of a mouroosee pottah at an invariable rent of dewuttur lands. Lord Chelmsford, in delivering the judgment, said:—

"The talook itself, with which these jummas were connected by tenure, was dedicated to the religious service of the idol. The rents constituted, therefore, in legal contemplation, its property. The Shebait had not the legal property, but only the title of manager of a religious endowment. In the exercise of that office, she could not alienate the property, though she might create proper derivative tenures and estates conformable to usage."

And this Committee having regard to the presumption arising from this state of things, and other facts appearing in the evidence, held that the pottah was not, in fact, established. (See Maharanee Shibessurree Debia and others *v.* Mothooranath Acharjo, 13 Moore's I. A., 270.)*

But it is to be observed that this Committee, whilst considering that the grant of such a pottah by a Shebait would be *primâ facie* a breach of trust, expressed an opinion that if the grant had been affirmed by a judgment, the succeeding Shebaits would have been bound by it; probably for the reason that after a judgment it must be assumed either that such a pottah was warranted by the terms of the original endowment, or by usage, or was in some way beneficial to the interests of the trust. It is said:—

"If the decrees appealed against stood unreversed, the title to hold at a fixed invariable rent would, on the pleadings, and especially on the judgments, be viewed as *res judicata*, binding on the parties and those claiming under them."

But, notwithstanding that property devoted to religious purposes is, as a rule, inalienable, it is, in their Lordships' opinion, competent for the Shebait of property dedicated to the worship of an idol, in the capacity as Shebait and manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks, and other like objects. The power, however, to incur such debts must be measured by the existing necessity for incurring them. The authority of the Shebait of an idol's estate would appear to be in this respect analogous to that of the manager for an infant heir, which was thus defined in a judgment of this Committee, delivered by Lord Justice Knight Bruce:—

"The power of the manager for an infant heir to charge an estate not his own is, under the Hindoo law, a limited and qualified power. It can only be exercised rightly in a case of need or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *bonâ fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. But of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the heir grounded on a necessity which his own wrong has helped to cause. Therefore the lender in this case, unless he is shown to have acted *malâ fide*, will not be affected, though it be shown that, with better management, the estate might have been kept free from debt." (See Hunooman Persaud Panday *v.* Mussumat Babooee Munraj Koonweree, 6 Moore's I. A. 243.)

It is only in an ideal sense that property can be said to belong to an idol; and the possession and management of it must, in

* 13 W. R., P. C., 18.

Digitized by Google

the nature of things, be entrusted to some person as Shebait or manager. It would seem to follow that the person so entrusted must, of necessity, be empowered to do whatever may be required for the service of the idol, and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir. If this were not so, the estate of the idol might be destroyed or wasted, and its worship discontinued, for want of the necessary funds to preserve and maintain them.

Assuming, then, that a Shebait may incur debts, or borrow money for necessary purposes, in the sense above explained, it appears to be right and reasonable that judgments obtained against a former Shebait in respect of debts so incurred should be binding upon succeeding Shebaits, who, in fact, form a continuing representation of the idol's property.

If such debts, and the judgments founded on them, were not held to be thus binding on successors, the consequence would be that no Shebait would be able to obtain assistance in times of need; for, on an opposite state of the law, he might defeat the creditors who had afforded it, by at once transferring the property to other Shebaits, as was actually done in the present case by Rajah Baboo, who, after the decrees were obtained against him, appointed the appellants, his wife and nephew, Shebaits in his place.

The above view is consistent with what appears to have been the opinion of this Committee in the passage already cited from 13 Moore's Indian Appeals, and with two decisions in India (Juggut Chunder Sein and another *v.* Kishwanund and others, 2 Select Reports, 126; and Kishnonund Ashroon Dundy *v.* Nursingh Doss Byragee, 1 Marshall's Reports, 485).

Before, however, applying the principle of *res judicata* to judgments of this character, the Courts should take care to be satisfied that the decrees relied on are untainted by fraud or collusion, and that the necessary and proper issues were raised, tried, and decided in the suits which led to them. These conditions appear to have been fulfilled in the present case.

It is to be observed that execution of the judgments sought to be set aside is decreed, and in their Lordships' view rightly, only against the rents and profits of the dewuttur lands. Whether the judgments have been satisfied by the profits already received, or whether some provision ought to be made out of such profits, during the pendency of the attachments, for the continuance of the worship of the idol, are questions not raised in this appeal. The object of the present suit is to have the properties released from attachment on the ground that the decrees were obtained by fraud, and were in no way binding on the succeeding Shebaits. In deciding against this claim their Lordships do not desire to prejudice the determination of the questions above adverted to, if they should be hereafter raised.

In the result their Lordships will humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal with costs.

The 3rd February 1875.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges*

Adjournment—Act VIII of 1859 *s.* 249.

Case No. 392 of 1874.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Gya, dated the 5th August 1874.

Tekait Het Narain Singh (Judgment-Debtor) *Appellant,*

versus

Gossain Luchmee Narain Pooree (Decree-holder) *Respondent.*

Mr. R. T. Allan, Baboo Nil Madhub Sen, and *Moonshee Mahomed Yusoof* for Appellant.

Baboos Chunder Madhub Ghose and *Hureehur Nath* for Respondent.

An execution-sale, which had been fixed for a certain date, was put off to the corresponding date in the following month on the application of the judgment-debtor, who consented that he would not object to any irregularities affecting the sale if it took place on any date in the following month. An istehar was also issued, and it was proclaimed only in a public place. After the sale took place as agreed upon, the judgment-debtor contended that he was entitled, under Act VIII of 1859 s. 249, to have a fresh proclamation issued on the spot, where the properties were situated.

HELD that as at the time of his application for postponement he did not contemplate any such proclamation, he could not now object to it not having been issued.

Kemp, J.—THE judgment-debtor is the appellant in this case. The object of the appeal is to have a sale, held on the 16th and 17th of April 1874, set aside. The purchaser has not been made a party to this

Digitized by Google

appeal. The objections of the judgment-debtor having been overruled in the Court below, the sale has been confirmed by that Court, and this Court can pass no decision affecting the purchaser in his absence. As to the question between the judgment-debtor and the decree-holder, we think the judgment of the Court below must stand. It appears that the sale was fixed for the 15th of March 1874. The judgment-debtor then appeared and produced a tumusook, or bond, for Rs. 19,000, and asked for two weeks' time to pay the balance due under the decree. The party who had to pay the bond appeared and admitted the bond, and the Court gave the judgment-debtor two weeks' time within which to pay the balance due under the decree. The Court directed that if the sum due was not paid within fifteen days, the sale would take place on the 15th of April, and that the judgment-debtor had consented that he would not object to any irregularities affecting the sale that would take place on that date or any day in the month of April. The order for the sale to take place on the 15th of March was therefore cancelled, and a proceeding was sent to the Judge of the District requesting him to put off the sale, and observing further that as the judgment-debtor had undertaken not to make any objection on the score of any irregularity affecting the sale to be held on the 15th of April, an istehar was to be issued fixing the 15th of April as the date of the sale, and proclaimed only in a public place. It is not contended that the istehar was not published in the cutcherry in which the sale was held. The 15th of April being a holiday, the sale took place on the 16th and 17th of April.

The judgment-debtor now contends that as the sale was postponed from the 15th of March to the 15th of April, he was entitled under Section 249 to have a fresh proclamation issued on the spot where the properties attached are situated, under the provisions of that Section. It is clear that when the judgment-debtor applied to the Court to give him time and to put off the sale to the 15th of April, he did not contemplate that any such proclamation under the provisions of that Section should be issued, for under that Section it is laid down that the proclamation shall be issued at least thirty days prior to the day fixed for the sale, and such a proclamation could not then have been issued within that period. Two decisions have been referred to by the pleader who argued the case for the appellant. The first is to be found in Volume III, Weekly Reporter, commencing at page 11, Miscellaneous Rulings. In that case Justices Loch and Seton-Karr having differed in opinion, the case was referred to the late Chief Justice, Sir Barnes Peacock, and he held, in concurrence with the opinion of Mr. Justice Loch, that under Section 249, where a sale is postponed indefinitely, a new proclamation giving notice of the day on which the sale will take place is necessary, and the reason given by him was that where a sale once advertised is postponed indefinitely, a new proclamation is just as necessary as a proclamation of the day originally fixed. Now in this case there was no indefinite postponement, and that decision therefore does not apply to the circumstances of the present case. The other decision is one reported in Volume VI, Weekly Reporter, page 84, Miscellaneous Rulings. In that case the postponement was for one month, but the sale did not in fact take place until a lapse of several weeks beyond that month, and there was no understanding that no fresh notice was to be given; that decision also does not apply to the circumstances of this case.

We dismiss the appeal with costs. Pleader's fees two gold mohurs.

The 4th February 1875.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble E. G. Birch, *Judge*.

Decree—Execution—Limitation—Act XIV of 1859 s. 20.

Case No. 116 of 1874.

Special Appeal from a decision passed by the Judge of Jessore, dated the 19th March 1874, reversing a decision of the Moonsiff of Magoorah, dated the 23rd September 1872.

Zumeer Sirdar (one of the Defendants) *Appellant,*

versus

Asseemoddeen Sirdar (one of the Plaintiffs) *Respondent.*

Baboo Grish Chunder Ghose for Appellant.

Digitized by Google

Baboo Bhungshee Dhur Sen for Respondent.

An application made on the 1st September 1870 for the further execution of a decree was rejected by a Moonsiff on the ground that, when an application was made on the 19th May 1865 for execution (although proceedings were taken on such application) the decree had been barred by the law of limitation.

HELD that the order of the Moonsiff was a right one; but it did not declare the previous proceedings to be invalid or set them aside.

Quære: What is the effect of not executing a decree for three years? Does it make the decree void, so that anything that has been done under it need not be set aside by a Court, or is it an irregularity which makes an application to the Court necessary to set aside processes issued and sales held in execution of the decree?

Couch, C. J.—THE suit in this case was brought to recover possession of 5 cottahs of land and a number of date trees. It was found by the Moonsiff that one of the plaintiffs, Arjan Sirdar, had a right to a moiety of the land, but that the other moiety which belonged to the other plaintiff Aseemooddeen Sirdar, was purchased by the defendant Zumeer Sirdar at a public sale in execution of a decree which he had obtained against Aseemooddeen.

The purchase was made at a sale which took place on the 18th of February 1868, and it appears that on the 29th of January 1872, an application having been made by Zumeer Sirdar for a further execution of the decree, the Moonsiff, after stating the various proceedings which there had been in the execution, held that when an application was made on the 19th of May 1865 for execution, the decree had been barred by the law of limitation. Consequently he rejected the application for execution then before him which had been made on the 1st of September 1870. All that he did on this occasion was to decide upon an application further to execute the decree. His decision refusing that did indeed include a statement that the proceedings upon the application in 1865 were invalid, because at that time the decree had been barred by the law of limitation; but he was not asked to set aside any of those proceedings. No application on that subject appears to have been made to him. His order was merely one refusing further to execute the decree. Thus, there has not been any decision or order by the Court which had to execute the decree that the proceedings under which the defendants make their title—the sale in execution in 1868—were invalidated. And the case comes within the decision which was quoted from XX Weekly Reporter, page 5, that Section 11 of Act XXIII of 1861 requires that the decree being barred by the law of limitation by which the sale in execution was invalidated should be declared by the Court executing the decree, or the Court hearing an appeal from its order, and cannot be declared in a separate suit. Here, the plaintiff, instead of applying in the execution proceedings to have the sale to the defendant, who is also the decree-holder, set aside on the ground that the decree had been barred by the law of limitation, has brought a separate suit, contending that the order of the Moonsiff in 1870 made the sale entirely void. That was not the effect of the order. It does not go to that extent. It was merely an order refusing further to execute the decree, stating, no doubt, as a reason for making it, that the decree was barred by the law of limitation. On this ground, we think, that the decree of the Moonsiff is a right one.

We wish it to be understood that we neither assent to nor dissent from the ground upon which the District Judge has based his decision. We express no opinion upon the question of the effect of not executing the decree for three years,—whether it makes the decree void so that any thing that has been done under it need not be set aside by a Court,—or is an irregularity which makes it necessary that an application should be made to the Court to set aside the sale. The words of Section 20 of Act XIV of 1859 do not say that the decree shall be void if no process of execution has been taken out within three years. They are that no process of execution shall issue. If process of execution has issued and sales have been made, the persons injured thereby should apply to the Court to have them set aside; and if they omit to do so, it may be that they cannot, after the lapse of several years, bring a suit saying that the proceedings are entirely void and confer no right upon a person who has become a purchaser under them. We only wish to say that we do not give an opinion upon that question, as it is not necessary for us to do so.

The decree of the Lower Appellate Court is reversed and the decree of the first Court is restored with costs.

Digitized by Google

The 4th February 1875.

Present :

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Purchaser of Joint-shares—Partition.

Case No. 733 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 5th January 1874, *affirming a decision of the Moonsiff of Penchoogunge, dated the 29th August* 1873.

Mansoorooddeen (Defendant) *Appellant,*

versus

Mahomed Sufdur and another (Plaintiffs) *Respondents.*

Baboo Grish Chunder Ghose for Appellant.

Baboo Joy Gobind Shome for Respondents.

In a suit for possession of land which plaintiff's vendor had purchased jointly with those under whom defendants claimed, HELD that it was not necessary for plaintiff to show an actual formal partition: it was sufficient for his case to show that his vendors, and he himself after them, had in fact for a considerable time held their share in a separate form.

Phear, J.—THIS case has not been very satisfactorily dealt with by the judgments of the two Lower Courts. We gather from a passage which is to be found in the judgment of the Moonsiff, and which seems to be supported by the language used in the third ground of special appeal, that both parties admitted that the persons under whom the plaintiffs claim and those under whom the defendants claim at some time jointly purchased the land which is the subject of suit, and other land.

The plaintiffs have put in and proved to the satisfaction of both the Lower Courts, the conveyance executed in their favor by some of these purchasing parties. And the effect of that is as we understand to convey to the plaintiffs the share of their vendors, whatever that might be. If that share was only a joint share of the subject in suit as the defendants seem to contend it was, then the conveyance would only pass the joint share. If it was a separate share or a right to exclusive possession, it would pass the right to exclusive possession. The plaintiffs say distinctly in their plaint that their vendors had exclusive possession, and that under their purchase, they, the plaintiffs, obtained exclusive possession from their vendors.

The defendants, on the other side, say that the plaintiffs' vendors never had anything but a joint possession of any part of the property, or at any rate that they never had exclusive possession of the subject of suit, while on the contrary they, the defendants, had in fact exclusive possession thereof and had obtained it from their vendors; and that this exclusive possession on the part of their side had been maintained for a period much exceeding the period of limitation.

If this be the right view of the contest between the parties in this suit, it appears that the real question which the Courts had to decide was the question,—which of these two stories is correct as to the exclusive possession of the land which is the subject of suit. Were the plaintiffs and their vendors in exclusive possession previously and up to the dates mentioned in the plaint, as the plaintiffs say they were; or were the defendants and their vendors in exclusive possession, as the written statement of the defendants say they were?

The Moonsiff, after stating that the question as to the party in whose distinct possession the disputed land is must be determined upon oral evidence alone, proceeds to say that the witnesses on each side have borne their testimony in favor of their own side; and that he thinks that the witnesses for the plaintiffs have spoken the truth, while those of the defendants have spoken falsehood. He does not unfortunately expressly say what is the conclusion of fact at which he arrives upon the evidence of the plaintiffs' witnesses. The Subordinate Judge, however, seems to have cured this defect. He says :—"I have examined all the evidence in "the record. I do not find any reason for "interfering with the decision of the Moon-"siff. It is satisfactorily proved that plain-"tiff's vendors were in possession of the "disputed land. That they sold the same "to plaintiff. That when plaintiff held the "said land, the defendant brought ryot "Mongola under his influence and a false "suit under Section 15 of Act XIV of 1859, "on an allegation of dispossession. That "on obtaining a decree, he took possession "and dispossessed plaintiff. The Moonsiff "relied upon this evidence. I do not see "any reason for distrusting it."

And upon this ground he dismissed the appeal.

It appears to us, on the whole, that both the Lower Courts agree in the conclusion that the plaintiffs had made out their allegation as to the possession of the land which is the

Digitized by Google

subject of suit. And this being so, and regard being had to the nature of the contest between the parties, the fate of the case was determined in favor of the plaintiffs.

It is objected on special appeal that "when the vendor of the plaintiff is the "purchaser of joint-shares like your "petitioner, the plaintiff, before he can "succeed in the suit, should show that "there was a partition, and the land in "dispute appertains to his share."

It was not necessary, we think, that he should show an actual formal partition: it was sufficient for his case to show that his vendors, and he himself after them, had in fact for a considerable time held their share in a separate form.

The other three grounds of appeal are not substantial grounds, and therefore we think that the appeal must be dismissed with costs.

The 5th February 1875.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Ancestral Property—Execution Sale—Liability of Purchaser—Nautches—Immorality.

Case No. 21 of 1874.

Regular Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 24th November 1873.

Budree Lall (one of the Defendants) *Appellant,*

versus

Kantee Lall and others (Plaintiffs) *Respondents.*

Baboos Mohesh Chunder Chowdhry, Taruck Nath Dutt, and *Judoo Nath Sahoy* for Appellant.

Mr. M. L. Sandel and *Baboo Hem Chunder Banerjee* for Respondents.

Following a ruling of the Privy Council it was HELD that a *bonâ fide* purchaser, for valuable consideration, of ancestral property sold in execution of a decree, is not bound to go further back than to see that there was a decree and that the property was liable to satisfy the decree. Where this is done, the heirs of the deceased judgment-debtor are not entitled to come in and set aside the proceedings and recover the property.

A son's freedom from obligation to discharge his father's debt, has respect to the nature of the debt and not to the nature of the property whether ancestral or acquired. If the debt of the father had been contracted for any immoral purpose, the son might not be under any pious obligation to pay it.

Attending nautches, and occasionally giving nautches at one's own expense, cannot be considered immorality, absolving from such obligation.

Kemp, J.—THE facts material to the decision in this case are that the plaintiffs claim to recover possession of the property, subject of the claim, on the ground that they are all members of a joint family alleged to be governed by the Mitakshara law. The suit is brought by the mother of the two minor sons of Pearee Lall Jha, the said Pearee Lall Jha being alive and living in commensality with his sons. The object of the suit is to set aside certain bonds and mortgages obtained by a Chummun Lall and Hur Deo Doss bankers, and also to set aside a purchase made by Budree Lall in execution of a decree, as also to cancel certain sales conducted in execution of decrees, dated respectively the 13th of December 1869, 25th of July 1868, and 22nd of July 1867.

The suit is valued at Rs. 5,877-7 and the property is alleged to be ancestral property. The plaint goes on to state that Munoo Runjun Jha, who was the common ancestor, acquired the property in his own name and that of his four sons, Issur Dutt Jha, Bharut Dutt Jha, Hurruck Lall Jha, and Pearee Lall Jha, the last mentioned son being the father of the minors who are the plaintiffs in this suit. It is alleged that Munoo Runjun died in Srabun 1271 Fuslee; that at the time of his death he left no debts; that his four sons took the property jointly and lived in commensality to the end of Assin 1269 Fuslee; that from the month of Kartick of that year they separated in mess and in business, and that the collections from that date were made in distinct shares. It is further alleged that the two minors were born, the elder son on the 11th of Pous 1269 Fuslee, and the younger son on the 6th Magh 1271; that their father Pearee Lall Jha squandered and wasted his substance and led an improper and immoral life, and that money was borrowed to meet his extravagances.

Digitized by Google

The defendant's pleas were that the sons were born after the dates of the alienations of the property, the elder son in the month of Chyet 1273, and the younger son in Magh 1275; that a considerable portion of the property in this suit is not ancestral but was acquired exclusively by the plaintiff's father and his brothers; that from the time of Munoo Runjun Jha, the four sons carried on separate karbars; that the defendant has acquired his title by purchase at a public sale in satisfaction of decrees and also from purchasers at such sales; that the plaintiff's father borrowed from Huree Mohun Thakoor to meet pressing demands upon the estate such as the payment of Government revenue; that the debt of Huree Mohun Thakoor was paid off by borrowing from Chummun Lall banker on a bond dated the 13th February 1865, and that after paying that debt the balance of the money borrowed was used to pay the deposit money on account of a Government ferry; that other debts were contracted also to meet pressing demands upon the estate, and that all these debts were contracted before the birth of the plaintiffs, and that this suit is brought in reality by the father for the purpose of annoying the defendants.

The Subordinate Judge found that the plaintiffs were born before the alienation; that Pearee Lall Jha squandered away his income and that the debts were incurred for immoral purposes; and that although the defendant had produced receipts of payment of Government revenue, these receipts are not sufficient to establish the legal necessity; that the defendants purchased with their eyes open; that they had only acquired the right and interest of Pearee Lall Jha; that it was incumbent on the defendants to enquire whether these sums were borrowed for legal necessity, and not having done so they must take the consequences and the maxim of *caveat emptor* applies to their case. The suit was, therefore, decreed in favor of the plaintiffs.

The first question that was raised in the course of the argument by the pleader who appeared for the appellant was whether upon the undisputed facts of this case, namely, that these properties were purchased in satisfaction of decrees of Court, the plaintiffs had any right to recover. In support of this argument, the pleader mainly relies upon a decision of the Privy Council in the case of Girdharee Lall and another *versus* Kuntoo Lall and others, and Muddun Thakoor *versus* Kantoo Lall and others, delivered by their Lordships of the Privy Council on the 12th of May 1874.* The 2nd point taken was that there was no reliable proof that either of the sons were in existence at the time the mortgages were made which eventually led to the sales in satisfaction of decrees obtained on these mortgages. The 3rd point raised was that even if it be admitted for the sake of argument that the sons were in existence at the time of the mortgage, the nature of the debt is such as to render the ancestral property liable. The 4th question is that the first three of the properties involved in the suit are the self-acquired property of the father, and that there was evidence on the record that the sons of Munoo Runjun, during the life-time of their father, had separate karbars, and that they dealt with the estate on the footing that their interests were separate and not joint. And lastly, that even assuming that a decree could be made in favor of the plaintiffs, they ought to be put to some terms as regards the refund of the purchase-money.

Speaking for myself, I am not satisfied at all with the evidence which has been given on behalf of the plaintiffs in support of the allegation that they were born previous to the mortgages which led to the sales in execution of decrees, the decrees being for the satisfaction of those mortgages. The uncle of the plaintiffs has been examined in this case: his name is Bhyro Dutt Jha. He says in a very general way that Kantee Lall, the elder son, was born in Pous 1279 and Santee Lall, the younger brother, was two years younger than Kantee Lall; the date of the birth of Santee Lall is not given. It is admitted in the evidence that these names Kantee Lall and Santee Lall are *Râsh* names; such names would be given to the boys after consulting the horoscope or other document relating to the position of the stars at the time of their birth. Now in this case no horoscope has been filed, nor any other document of the description alluded to above. The Puroheet of the family has been examined and he admits that it was customary for families of the status of plaintiff's family and also for this family itself to have horoscopes drawn up. I, therefore, think that the Subordinate Judge was wrong in coming to the conclusion he has done on the evidence before him, that the sons were born prior to the mortgages which led to the sales in execution in satisfaction of the mortgages. On this ground alone, I think that the suit

* 22 W. R., 56.

Digitized by Google

of the plaintiffs might have been dismissed, but on the first question which is raised by the learned pleader who appears for the appellant, I am clearly of opinion that this case is governed by the judgment delivered by their Lordships of the Judicial Committee of the Privy Council on the 12th of May 1874. In that case their Lordships allude to a judgment delivered by Lord Justice Knight Bruce and quote the following passage from that judgment. "Though an estate be ancestral, it may be "charged for some purpose against the heir "for the father's debts by the father." Then his Lordship referred to a case to be found in the 6th volume of decisions of the Sudder Dewanny Adawlut, North West Provinces. He then proceeds to observe that "unless the debt was of such a nature that "it was not the duty of the son to pay it, "the discharge of it, even though it affected "the ancestral estate, would still be an act "of pious duty in the son,—that by the Hindoo law the freedom of the son from the "obligation to discharge the father's debt "has respect to the nature of the debt and "not to the nature of the estate, whether "ancestral or acquired by the creator of the "debt." Then their Lordships who delivered the judgment of the 15th of May 1874 proceed to say that "it was necessary to see "what was the nature of the debt for the "payment of which it was necessary to raise "money by the sale of the property in question. If the debt of the father had been "contracted for an immoral purpose, the son "might not be under any pious obligation to "pay it, and he might possibly object to "those estates which had come to the father "as ancestral property being made liable to "the debt." Then there is a passage in the judgment which has been greatly relied upon by the learned pleader for the appellant. It is to this effect, that "a purchaser in "execution is surely not bound to go back "beyond the decree, to ascertain whether "the Court was right in giving the decree, "or having given it in putting up the property for sale under an execution upon it; "that it had already been shown that if the "decree was a proper one, the interests of "the son as well as the interest of the "father in the property, although it was "ancestral, were liable for the payment of the "father's debt; that a purchaser under that "execution is not bound to go further back "than to see that there was a decree and "that the property was liable to satisfy the "decree; and having enquired into that "and having *bonâ fide* purchased the estate "under the execution and *bonâ fide* paid a "valuable consideration for the property, the "plaintiffs are not entitled to come in and "to set aside all that has been done under the "decree and execution and recover back "the estate from the defendant."

Now in the first place, looking at the nature of the debts, which is the test to be applied according to the ruling which has just been quoted, it has been alleged for the plaintiffs that the father contracted these debts for an immoral purpose. There is evidence, general evidence, that the father used to attend nautches and that he occasionally also gave nautches at his own expense. If that is to be considered immorality and an estate is not to be made liable for a father's debts because the father attends nautches or gives nautches at his own expense, all I can say is that there is not an estate in the country that could pass to a decree-holder in execution if sales are to be set aside on such a ground. There is one witness who alludes to the father having kept a Mahomedan prostitute, but he does not give the name of the woman. I consider this a mere fringe to the case, and I attach no reliance whatever on this evidence.

We might now stop here and say that inasmuch as there has been a decree of Court and the property has been sold in satisfaction of that decree and *bonâ fide* purchased by the appellant before us for valuable consideration, we need not go behind that decree under the ruling of the Privy Council, but as the case has been argued at great length on both sides, and as it has been clearly shown to me that the debts have been satisfactorily accounted for, I wish to say a few words on this part of the case.

The original debt was for Rs. 2,000 for the repayment of a bond contracted on the 13th of February 1865. The bond was paid off and is on the record. Then there is a debt of Rs. 1,100 which appears to have been paid to Huree Mohun Thakoor, one of the parties who advanced money to the father of the plaintiffs. This is endorsed on the back of the bond. Then a sum of Rs. 800 appears to have been paid on account of a deposit in respect of the lease of a Government ferry. This is proved by the evidence of Jaynath which evidence is supported by a challan of the collectorate which shows that this sum of Rs. 800 was paid on account of Pearee Lall as deposit money for a Government ferry the farm of which was taken by Pearee

Digitized by Google

Lall. Then it is further shown by the challans of the collectorate that out of the money borrowed by Pearee Lall, at least 500 rupees were paid for Government revenue. Then it is further shown that Rs. 300 were paid on account of the rent due to Government for the ferry, Rs. 100 for the purchase of a boat, the said boat being required for the ferry. Then with reference to the money borrowed from Hur Deo Doss, the defendants have examined Hur Deo Dass, the original mortgagee, and although they have not been able to account as in the other instance how the money was spent, we do not think that they are bound to do so, inasmuch as they purchased the property in execution of a decree. There is also a good deal of evidence to show that some portion of the property was the self-acquired property of the four brothers. For instance, there is a petition of the four brothers in a mutation case; there is the evidence of Bhyro Dutt Jha to be found in page 3, Appendix II; there is also a petition in the butwarah case and the evidence of Bhyro Dutt Jha in the former case in the Moonsiff's Court.

We, therefore, think that the decision of the Subordinate Judge must be reversed and the appeal decreed with costs of both Courts payable by the respondent.

Pontifex, J.—I also think that it is impossible to distinguish this case from the case of Girdharee Lall *vs.* Kantoo Lall reported in the last number of the Law Reports of the Privy Council,* the defendants here being purchasers under a decree; and even if the purchase had not been made under a decree, I think there is no reliable evidence that the monies borrowed were applied to immoral purposes. The alleged immorality of the father is attempted to be proved by mere general statements which are certainly not sufficient to prove the allegation. On the other hand, I think there is reliable evidence that a considerable portion at all events of the monies borrowed, and in respect of which decrees were given and the sales held, were borrowed for legitimate purposes, and such as it would be proper to charge the estate with. I agree, therefore, that the decree of the Court below should be reversed.

* 22 W. R., 56.

The 5th February 1875.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Jurisdiction—Issues—Act XXIII of 1861 *s.* 3.

Kartick Nath Panday, *Petitioner,*

versus

Roy Nundeput Mahatab Bahadoor and another, *Opposite Party.*

Baboo Kalee Kishen Sen for Petitioner.

Mr. C. Gregory for Opposite Party.

Where a Sub-Judge, after registering a plaint and allowing the parties to go to issue on the question of jurisdiction, found that he had no jurisdiction, it was held that he did wrong, under Act XXIII of 1861, s. 3, in dismissing the suit. He ought to have returned the plaint to the plaintiff.

Kemp, J.—We think that under Section 3, Act XXIII of 1861, the Court below ought to have returned the plaint to the plaintiff in order that it might be presented in the proper Court. The attachment during the pendency of the former suit was made by the Tirhoot Court, and it appears that the property attached consisting of a large number of logs of timber is lying at Hajeepore which is within the jurisdiction of the Tirhoot Court. The Subordinate Judge of Sarun ought in our opinion not to have registered this plaint at all, and further, after doing so and allowing the parties to go to issue on the question of jurisdiction, when he found that he had no jurisdiction he was wrong under Section 3 to have dismissed the suit: he ought to have returned the plaint to the plaintiff.

We, therefore, direct that the plaint be at once returned to the plaintiff in order to its being presented in the proper Court, namely, the Tirhoot Court, which Court had made the attachment of the timber and had jurisdiction in the case.

We think, however, that as the plaintiff was to blame in bringing on a trial on the issue of jurisdiction he ought to pay the costs incurred by the opposite party in the Court below up to the time of the rejection of the plaint, and the costs of this application. Pleader's fees 5 gold mohurs.

Digitized by Google

The 8th February 1875.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Ancestral Property—Possession by a Female—Decree against Shareholders.

Case No. 637 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 17th December 1873, modifying a decision of the Moonsiff of Penchoogunge, dated the 30th June 1873.

Kefaetoollah and another (two of the Defendants) *Appellants,*

versus

Ariza Bibee (Plaintiff) *Respondent.*

Baboo Joy Gobind Shome for Appellants.

Baboo Bharut Chunder Dutt for Respondent.

In a suit to recover property in the enjoyment and possession of defendant, a female plaintiff can only succeed on the strength of her own right: not merely because it is the property of her husband, who does not object to her recovering it.

There is no necessary presumption that property in the possession of a respectable female's husband, brother, and son respectively, is possession on her behalf, and not on theirs.

In a suit where the question is the right to undivided shares of property, a decree should not be given against some only of the shareholders for the recovery of a share, unless it is proved that those shareholders exclusively are in possession of it and interfering with claimant's enjoyment thereof.

Phear, J.—THE subject of suit in this case is of a most complicated character, and the mode in which the plaintiff traces her right to the different parts of it is not quite easy to understand. It is not necessary, however, for us at this moment to analyse this part of the case. It is sufficient to say that the plaintiff claims an undivided share of certain *kheragee* land, subject to the payment of rent under a pottah which covers that land, and also another share of *kheragee* land rent-free. The first she says she is entitled to partly by right of inheritance and partly by right of a conveyance from her husband and others. The second she says she is entitled to by right of conveyance from her husband's brother Kolimoollah.

The defendant said in the first place that the plaintiff never had been in the possession of the land in suit within or before the period of twelve years, and that she had never been dispossessed.

This plea of limitation the Moonsiff thus disposes of, so far as it affects the property to which the plaintiff claims by ancestral right. He says:—"There is not a tittle of evidence to prove that plaintiff ever held possession of the share which she has claimed to recover on the allegation of her ancestral right thereto." He states that the utmost that the witnesses depose on this point is the receipt of rent by Panaoollah, the husband of the plaintiff, and Naziroollah, her son. But he adds there is nothing to show that these persons did not receive the rents on their own behalf. And upon this finding of fact he arrives at the conclusion that the plaintiff is not entitled to recover that portion of her property.

With regard to the share which she says that she purchased from her husband and her husband's brother, he says that the case is different. The defendants themselves admit that this property did at some time belong to these two persons. And while they endeavour to show that it had passed from them to Bahadoor Ali by a sale, they had in his, the Moonsiff's, opinion failed in this point. And then he says the actual execution of a deed of conveyance by Panaoollah, the husband, and Bahadoor Ali, is beyond doubt. And therefore whether the property had actually passed from these persons to the plaintiff by virtue of the deed or not, inasmuch as they were both of them standing by and assenting to the present suit of the plaintiff, the plaintiff was entitled to recover as against the defendants. His words are these:—"Further, the defendants do not deny the title of Panaoollah. Even if it be taken for granted that Panaoollah himself has caused the institution of this suit in a benamee manner through his wife, the plaintiff, still as it is not proved that the entire right of Panaoollah was sold by him to Bahadoor Ali, it must be held without doubt that he (Panaoollah) is entitled to obtain possession of the share for which he caused the suit to be instituted through his wife."

It appears to us that the view thus taken by the Moonsiff is erroneous. The plaintiff sues to recover property which she says is in the enjoyment and possession of the defendant. She is not entitled to recover in this suit except upon the strength of her

Digitized by Google

own right, whatever that may be. She cannot recover merely because it may be her husband's property and her husband does not object to her recovering it. The defendants have a right to maintain in this suit that the plaintiff should not have a verdict unless she shows to the satisfaction of the Court that the property which she claims is in fact her own property.

On appeal the Subordinate Judge reversed the Moonsiff's decision with regard to the ancestral property, because he held that when it is proved that the plaintiff's husband, the plaintiff's son, and the plaintiff's brother had received the rents of the property, and when, as is well known, respectable females do not themselves collect the rents of the property which belongs to them, then the possession of these gentlemen, namely, her husband, her brother, and her son respectively, must be held to be possession on behalf of the plaintiff and not for themselves.

We think that this inference is erroneous. It may be very difficult in cases of this kind for the claimant to show that the possession of the property was hers, notwithstanding that the actual management and administration was in the hands of the male members of her family. Still it is not impossible for her to show this if it be the fact; the means certainly existed in the present case. If she had chosen herself to give her evidence; or if the facts of actual receipt and application of the money had been deposed to by persons able to do so, we should have had materials upon which a conclusion in her favor might possibly have been made. But she has not done enough to support her case when she has merely shown by the evidence of ryots and witnesses of that class that the rents of the property have been taken by her husband, her son, and her brother. It seems to us that the Judge, in reversing this portion of the Moonsiff's decision, has done so upon insufficient grounds, and that therefore this portion of his judgment cannot be allowed to stand. As to the other part of the case, the Subordinate Judge appears to have adopted the view of the Moonsiff in its entirety. And, as we have already said we think that view is erroneous, it follows, as regards the two appealing defendants, that the suit ought to be dismissed. And this indeed would follow even more shortly upon the finding of fact which the Moonsiff himself expressed in these words, that there is not a bit of evidence that the principal defendants are in possession of the share claimed by the plaintiff. We may add that in cases of this kind, where the matter in question is the right to undivided shares of property, it is incumbent upon Courts to be especially careful to see that a decree is not given against some only of the shareholders for the recovery of a share of the property, unless it be proved very distinctly that those shareholders, and not any other shareholder, are in the enjoyment and possession of it, or interfering with the claimant's enjoyment of it. It does not even appear in this case that the plaintiff is wrongly kept out of any share of the property by any of her co-sharers—still less that it is the appealing defendants who are the wrong-doing persons.

We think that, as regards the appellants, the decree of the Lower Courts must be reversed, and the suit dismissed with costs in all the Courts.

The 8th February 1875.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Sons' Liability for Father's Debts—Execution Proceedings.

Case No. 428 of 1874.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Tirhoot, dated the 22nd August 1874.

Ramanoogro Singh (Decree-holder) *Appellant,*

versus

Kishen Kishore Narain Singh (Judgment-Debtor) *Respondent.*

Mr. C. Gregory and *Moonshee Mahomed Yusoof* for Appellant.

Baboos Hem Chunder Banerjee and *Aubinash Chunder Banerjee* for Respondent.

Whether property seized by a judgment-creditor in the hands of his deceased judgment-creditor's son, is held by the son under such circumstances as render him liable for his father's debts, is a question which cannot be tried in execution proceedings, but must form the subject of an independent suit.

Phear, J.—In this case the judgment-creditor seeks to sell property in the hands of the respondent for the purpose of satisfying a decree which he formerly obtained against the respondent's father, now deceased.

Digitized by Google

The respondent objects, saying that this was not his father's property.

The decree is purely a money decree, a decree which in effect declared that the father was personally liable to pay to his judgment-creditor a certain sum of money. Now that the father is dead, the judgment-creditor can no doubt follow his property in the hands of his son or of any body else, and make it liable to pay the deceased's debt. But he must show that the property which he endeavours to follow is the father's property. He has declined, however, in these proceedings to give any evidence bearing upon the point at all. And the only thing in the shape of evidence which we have before us is the petition of the respondent, which was filed when the judgment-creditor applied to have the respondent's name substituted on the record for that of his father. In this petition he says that the property which he has received, and which the judgment-creditor seeks to sell, is his own self-acquired property, though he at the same time says that it was ancestral property, stating certain grounds upon which he maintains it is now his own property.

We think that this petition is not sufficient in itself to raise a *primâ facie* case in favor of the judgment-creditor. It may be, no doubt, on the authority of the late Privy Council decision, which is reported in 22 Weekly Reporter, page 57, and other decisions with which we are familiar in this Court, that the property which the judgment-creditor has seized in the hands of his son was taken by the son, or is held by the son, under such circumstances as render the son liable to pay his father's debts, this decree-debt among them, out of that property. But a question of liability of this sort cannot, we think, be tried in the present execution proceedings. It must form the subject of an independent suit, when both parties will have the opportunity to fully establish the facts upon which their rights depend. In the absence of any evidence beyond that which is afforded by the petition of the 3rd August 1873, we think that the Subordinate Judge was right in holding that the judgment-creditor failed to show that the property against which he sought execution was property liable to be applied to the purpose of discharging the decree which he obtained against his deceased debtor.

We dismiss the appeal with costs.

One gold mohur is allowed for pleader's fees.

The 9th February 1875.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Special Appeal—Question of Fact—Remand—Removal to High Court as a Regular Appeal.

Case No. 639 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Sylhet, dated the 23rd December 1873, affirming a decision of the Moonsiff of Russoolgunge, dated the 11th February 1873.

Kristo Gobind Kur and another (two of the Defendants) *Appellants,*

versus

Gunga Pershad Surma (Plaintiff) *Respondent.*

Baboo Joy Gobind Shome for Appellant.

Baboo Grish Chunder Ghose for Respondent.

Where the Court of first instance did not give very satisfactory grounds for its conclusion upon a question of fact upon which the case almost entirely turned, and the Lower Appellate Court pronounced the first Court's reasons to be good without going into the merits or recording its view of the evidence, the High Court, in special appeal, reversed the Lower Appellate Court's decision and remanded the case for a re-hearing; but for the purpose of the re-hearing directed the removal of the case to the High Court as a regular appeal.

Phear, J.—This case turns almost entirely upon this question of fact, namely, whether the purchases effected by the defendant Kristo Gobind on the 8th and 15th January 1866 were *bonâ fide* purchases for himself, or merely benamee for Juggo Mohun Shaw.

The Moonsiff says with regard to these:—

"His first purchase is dated the 8th "January 1866, the one whereby he states "having purchased Juggo Mohun's four "anna share in talook No. 52. Now it "appears from the testimony of one Shib "Chunder Surma that his cousin Krishto "Chunder Surma held in his (Shib Chunder "Surma's) name a decree against the said "Juggo Mohun; that in execution of that "decree the latter was arrested, and that "after it had been amicably settled between "the parties, it was transferred as a mere "sham to defendant Kristo Gobind through

Digitized by Google

"the importunities of the judgment-debtor "and some other persons. Now in execution "of this sham decree, which was thus pur- "chased for nothing with a view to defraud "creditors, Juggo Mohun's share in talook "No. 52 was attached and put up for sale "and was purchased by the purchaser "decree-holder, namely, defendant Kristo "Gobind. Supposing that Shib Chunder "has spoken truth, and I see no reason why "he should speak falsehood, the fraudulent "nature of Kristo Gobind's purchase appears "as clear as noonday. Besides, it is worthy "of remark that Shib Chunder is not a man "of no position in life. He is a respectable "pleader of a respectable Moonsiffee, and as "such no Court of Justice will be justified "in throwing aside his testimony without "very strong reason. Again, there is "another significant circumstance which "casts very great doubt upon defendant's "case. The witnesses examined on behalf "of the defence attempt to show that Kristo "Gobind had contracted loan with a view to "purchase Juggo Mohun's share in talook "No. 52, but this statement of the witnesses "could not be true. In the sale certificate, "dated the 8th January 1866, which has "been put in by defendants to prove their "purchase of Juggo Mohun's share in the "said talook, it is stated distinctly that the "purchase-money was paid out of the "decretal amount. Then what was the "earthly necessity of contracting a loan. "Considering all these circumstances, and "bearing in mind that the said Juggo "Mohun was head and ears in debt, and was "very anxious to hold his estate *benamee*, "as would appear from the testimony of "Pran Kishore Deb,—considering all these "circumstances as well as the circumstance "of Juggo Mohun being some way related to "defendants, I entertain very little doubt in "holding that the aforesaid purchase of "Kristo Gobind was merely benamee for "Juggo Mohun."

It appears to us that the Moonsiff has not here given very satisfactory grounds for this conclusion. If this decree was satisfied out of Court between the Surmas, the judgment-creditors on the one side, and Juggo Mohun, the judgment-debtor, on the other, it does not follow that Kristo Gobind to whom the decree was transferred, took it for the purpose of effecting a fraud. Taking the two parts of the Moonsiff's finding together, it would seem that the judgment-debtor Juggo Mohun was certainly in debt to the Surmas, and also as the Moonsiff expresses himself, "was head and ears in debt" elsewhere. Therefore the money by which the Surmas were satisfied could hardly have come from Juggo Mohun himself. The only person then from whom it could come, so far as appears, would be Kristo Gobind, *i.e.*, the person to whom the decree was assigned or transferred. If this were so, this fact would not only do away with the imputation of fraud which the Moonsiff has made against Kristo Gobind, but it would afford an entirely sound basis for Kristo Gobind's purchase at the execution sale. We, I need hardly say, have not on special appeal, the evidence before us, and we cannot tell whether the Moonsiff rightly represents its effect here. If he does, so far as we understand him, it seems to us that the conclusions at which he has arrived upon the basis of it, are by no means satisfactory.

With regard to the other purchase he says—"It appears from a will dated the "16th Pous 1271, that Juggo Mohun Shaw "had no right title or interest in the said "soga but that his father Juggo Nath Shaw "was the sole proprietor, and that accord- "ingly the latter willed it away among "other property to his grandsons, namely, "the sons of Juggo Mohun. It also appears "from that will that it was subscribed to "among other witnesses by defendant Radha "Nath and presented for registration by "defendant Kristo Gobind; *en passant* it is "to be remembered that this document has "been proved to be fraudulent by one of my "predecessors. Again, it would appear "from a deed of mortgage, dated the 15th "Assar 1270, that the said property, which, "according to the above will, was the sole "property of Juggo Mohun's father, was "pledged by Juggo Mohun to one Nitya "Nund Dhur on that date, and that most of "the witnesses whose names appear in the "said will appear as such in this deed. "Now, Kristo Gobind's case is that he "purchased Juggo Mohun's rights and "interests in Mahomed Ali Khan Saga at "auction sale held in execution of a decree "of the said Nitya Nund in respect of the "mortgage debt above referred to. Knowing "full well from the circumstance of his "having caused the registration of the "aforesaid will that Juggo Mohun had no "right or title or interest in the said pro- "perty, and that it had been transferred to "Juggo Nath's grandson, I am quite at a "loss to make out how Kristo Gobind ven- "tured to purchase it as being the property "of Juggo Mohun. This circumstance is

Digitized by Google

"alone sufficient to show that there was "some thing very wrong in the whole trans- "action. This inference will appear to be "not wide out of the truth when it is con- "sidered that the alleged mortgagee Nitya "Nund Dhur is a relative of the said Juggo "Mohun. To my mind the so-called will, "mortgage deed, and Kristo Gobind's pur- "chase are tissues of fraud resorted to with "a view to defraud *bonâ fide* creditors."

If we take the facts as thus stated by the Moonsiff, it would appear that Kristo Gobind obtained a good title through the mortgage. For, if it be the fact, as the Moonsiff says it was, that he knew the will was fraudulent and of no effect, then that circumstance afforded an essentially good reason for his concluding that Juggo Mohun could give a title to the mortgagee, and that thereby a valid title would pass to him by purchase under the mortgage decree.

So that with regard to the second sale as with regard to the first, it seems to us that the conclusions which the Moonsiff has drawn from the evidence, as he himself has explained them, are altogether unsatisfactory.

On appeal against this judgment the Lower Appellate Court abstained from going into the case at all. The Judge said,—"It "appears to me that the appellants have no "title to the properties claimed by plaintiff, "and that they have no standing ground at "all. The proof and decision given in the "claim case is not positive but collateral "proof in support of plaintiff's claim. I "consider that the reasons given by the "Moonsiff for decreeing the claim are good, "and that there would have been a manifest "failure of justice if the claim had not been "decreed; and I arrived at this conclusion "after hearing patiently the arguments of "the vakeels for nearly a whole day. After "carefully perusing the evidence given on "both sides, I uphold the order and dismiss "this appeal with costs."

As we think that the reasons given by the Moonsiff are far from being good, and are indeed very unsatisfactory, it is most unfortunate that the Judge himself has not gone into the merits of the case and given us the benefit of his view of the evidence and the conclusions which he himself draws from it. It is not enough for him to say that he has patiently listened to the arguments of the vakeels for nearly a whole day, to justify his baré statement that the reasons given by the Moonsiff are good.

Under these circumstances, we think that the decision of the Lower Appellate Court cannot be allowed to stand in its present form. And accordingly we reverse that decision and remand the case to that Court for re-hearing. But we think it right for the purpose of the re-hearing to direct that the case be removed to this Court as a Regular Appeal.

The costs will abide the event.

The 12th February 1875.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble E. G. Birch, *Judge.*

Rent Suit—Special Appeal—Act VIII (B.C.) of 1869 *s.* 102—*High Court's Power of Superintendence—Charter Act s.* 15.

Appeal under Section 15 *of the Letters Patent, from a decision passed by the Hon'ble J. B. Phear, one of the Judges of this Court, dated the* 24*th November* 1874, *in Special Appeal No.* 565 *of* 1874, *from a decision passed by the Officiating Additional Judge of the* 24-*Pergunnahs, dated the* 4*th December* 1873, *reversing a decision of the Moonsiff of that district, dated the* 25*th September* 1872.*

Kureem Shaikh (one of the Defendants) *Appellant,*

versus

Mokhoda Soonduree Dassee (Plaintiff) *Respondent.*

Baboo Rash Beharee Ghose for Appellant.

Baboo Mohesh Chunder Chowdhry for Respondent.

A suit for arrears of rent (Rs. 6-8), which was decreed by the first Court, was dismissed by the Lower Appellate Court on the ground that plaintiff being only a sharer could not sue separately for her proportion of rent. From this judgment a special appeal was preferred:

HELD, that as the judgment shewed that a question of title was not even considered, the decree in general terms could not be held to have determined it. Under Act VIII (B.C.) of 1869 s. 102, therefore, no appeal to the High Court lay in the suit.

Where the Lower Appellate Court having jurisdiction has only erred in the exercise of it, and no appeal is allowed by law, the High Court is not at liberty to exercise its superintending power under the Charter Act s. 15.

Couch, C.J.—THIS suit was brought for arrears of rent, and the amount claimed is Rs. 6-8. The plaintiff alleged that her

* *Ante*, p. 11.

Digitized by Google

deceased husband had a four-anna share in the paternal talook of the 3rd and 4th defendants and himself; that the co-sharers were all in possession by realizing rents from the ryots through a common gomastah, who divided the collections among them according to their respective shares; that misunderstandings having arisen between the plaintiff and the other co-sharers, the plaintiff began to collect the rents due for her share separately from 1278; that the first defendant held a jumma within the mehal of Rs. 45-6-5 gundas, whereof Rs. 11-5-11-1 cowree was due to the plaintiff, of which the defendant had paid Rs. 5. The ryot defendant, in his written statement, said that the plaintiff had no right or title in the talook in question, and neither she nor her deceased husband was ever in possession thereof; that he had always paid rents to the gomastahs of the 3rd and 4th defendants, including the year for which the claim was made; and that the suit had been falsely brought in consequence of the misunderstanding between the plaintiff and her landlords.

The 3rd and 4th defendants said that they were the sole owners and had always collected rents from the ryots.

The Moonsiff having made a decree for the plaintiff for the sum claimed and interest, there was an appeal to the District Court, which was heard by the Additional Judge, who found that the allegation of the ryot defendant having paid rent for 1278 to the plaintiff separately was "a mere falsehood asserted to attempt to evade the force of the late decisions," and dismissed the suit on the ground that the plaintiff was only a sharer, and could not sue separately for her proportion of the rent from the ryots.

A special appeal was preferred from this judgment, which was heard by one of the Judges of this Court, who reversed the decree of the Lower Appellate Court, and remanded the case to that Court for trial upon its merits. An appeal has been preferred under clause 15 of the Letters Patent from this order.

We think we should first consider whether a special appeal lies in this case. If it does not, it is not necessary to determine whether the decision of the Lower Appellate Court is right, and as the law cannot be considered as settled by the Full Bench decision in the 21 Weekly Reporter, page 46, it is better not to do so; for it might be said hereafter that our opinion upon this point was extra-judicial. By Section 102 of Act VIII (B.C.) of 1869, an appeal does not lie to this Court in a suit such as this is, if the amount sued for, or the value of the property claimed, does not exceed one hundred rupees, and a question of right to enhance or vary the rent of a ryot or tenant, or any question relating to a title to land or to some interest in land as between parties having conflicting claims thereto has not been determined by the judgment. It is true that the decree of the Lower Appellate Court simply dismisses the suit, which was the only decree that could be made upon the judgment that was given. But the judgment shows what was determined, and Section 102 uses that word, showing, we think, that the judgment and not the decree is to be looked at in applying that Section. Where the judgment shows not only that a question of title was not determined, but that the Judge did not even consider it, we think a decree in general terms cannot be held to have determined it. There are many cases in which the Court has resorted to the judgment for the interpretation of the decree. And there is frequently such a want of precision and accuracy in the decree, that if this were not done much injustice would ensue. For instance, if another suit were brought by the plaintiff to try the question of title between herself and the 3rd and 4th defendants, I think the Court could not say that the question had been heard and determined in this suit so as to make Section 2 of Act VIII of 1859 applicable. If it said so, it would be contrary to the fact, and the plaintiff would be concluded by a supposed determination when none was made.

But the learned Judge said that even if his view of the decree were not correct, he thought he ought to exercise the jurisdiction which is reposed in the Court by the 15th Section of the Charter Act. As to this, the question appears to us to be whether, where the objection to the proceeding or judgment of the Lower Court might be taken in an appeal, and there is no want of jurisdiction, the Lower Court having only erred in the exercise of it, and the appeal is expressly disallowed by law, the Court should exercise the power conferred on it by the 15th Section. This would be to do indirectly what the law says the Court shall not do directly, and would be refusing to give effect to the law which disallows the appeal. In our opinion the superintending power of the Court ought not to be used in this way. And as a matter of discretion we would not exercise it in this case. The title of the plaintiff to a share of the rent may be tried in a suit

Digitized by Google

against the persons who have received it from the ryot without making him a defendant. We reverse the order appealed from, and dismiss the special appeal with costs, including the costs of this appeal.

The 12th February 1875.

Present :

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Certificate of Administration—Act XXVII of 1860.

Case No. 503 of 1874.

Miscellaneous Appeal from an order passed by the Officiating Judge of Rungpore, dated the 25th September 1874, *affirming an order of the Subordinate Judge of that district, dated the 9th April* 1873.

Gobind Chunder Bagchee (Judgment-debtor) *Appellant,*

versus

Doorga Monee Debia (Decree-holder) *Respondent.*

Baboo Debendro Narain Bose for Appellant.

Baboo Mohendro Lall Mitter for Respondent.

The receipt of money under a certificate granted in pursuance of Act XXVII of 1860 does not give a title to the money; the holder only becoming trustee for the person to whom the money belongs.

Phear, J.—PERHAPS the order which has been made in this case by the Subordinate Judge is not very happily worded. But we understand from it that there is money in Court realized by execution of a decree which had been made in favor of one Kripa Moyee; that Kripa Moyee is dead, and that this money is payable to the person, whoever he may be, who is entitled to receive monies due to Kripa Moyee.

Upon this state of facts, the present petitioner, Doorga Monee, as guardian and on behalf of Gobind Pershad, comes to the Subordinate Judge with a certificate under Act XXVII of 1860, which certificate authorized her to receive monies of Kripa Moyee. And the order of the Subordinate Judge directs that the amount realized be paid to her. If this is the right view of the facts and of the events which have occurred, then the objections which have been made before us to the order of the Judge are not substantial. The receipt of money under a certificate granted in pursuance of the provisions of Act XXVII of 1860 does not, as we have often had occasion to remark, give a title to the money. The holder of the money so received only becomes trustee of the money for the person to whom it really belongs.

The appeal is dismissed with costs.

The 12th February 1875.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Execution Proceedings—Claim by Third Party—Act VIII of 1859 *s.* 230.

Case No. 492 of 1874.

Miscellaneous Appeal from an order passed by the Officiating Judge of Rungpore, dated the 14th July 1874.

F. J. Fergusson, Esq., Receiver of the estate of the late Baboo Prosunno Coomar Tagore (Objector) *Appellant,*

versus

Nil Komul Lahiree and others (Decree-holders) *Respondents.*

Baboos Sreenath Doss and *Omerendro Nath Chatterjee* for Appellant.

Baboo Gopal Lall Mitter for Respondents.

Where a claim made by a third party in the course of an execution proceeding is rejected, the claimant's proper remedy is a regular suit, or to wait till dispossessed, and then proceed under Act VIII of 1859 s. 230.

Phear, J.—WE think there is no appeal in this case. The petitioner in appeal was not a party to the suit, or a party directly affected by the decree. Therefore, the objection which he made to the execution of the decree does not come under Section 11, Act XXIII of 1861, as the Judge below seems to have thought that it did. Neither is this a case which has arisen under Section 230 of the Civil Procedure Code, because admittedly the objector has not yet been dispossessed. It is simply the case of a claim made by a third party in the course of an execution proceeding, which claim has been rejected. The proper course of proceeding for the objector to take for the purpose of obtaining a remedy, if he is entitled to any remedy, is for him to bring a regular suit or to wait until he is dispossessed and then to proceed under Section 230.

We reject this appeal with costs.

One gold mohur is allowed for pleader's fees.

Digitized by Google

The 12th February 1875.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Decree ultra vires—Remedies.

Case No. 414 of 1874.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Rajshahye, dated the 4th July 1874.

Doorga Doss Sandyal (Judgment-debtor) *Appellant,*

versus

Panchoo Ram Mundul (Decree-holder) *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Mr. I. T. Woodroffe and *Baboos Sreenath Doss* and *Rash Beharee Ghose* for Respondent.

Where a decree is *ultra vires*, the debtor's remedy is either by an application for review or by an application to the High Court to exercise its powers under the Charter Act, s. 15.

Phear, J.—We think that we cannot entertain this appeal. The objection made by the appellant to the order of the Court below is in substance an objection that the decree which was passed in this case was in a certain particular *ultra vires*. But the Registration Act itself has forbidden any appeal against the decree itself. If the decree is *ultra vires*, then the remedy which the debtor ought to seek is not by way of appeal, but either by an application for a review to the Court which passed it or of an application to this Court to exercise its general powers of supervision which are conferred upon it by Section 15 of the Charter Act. And the difference between an application under that Section and the present appeal, is this,—namely, that in an application of that kind, the applicant will be able to explain all the circumstances which have led to his having acquiesced so long as he has done, *i.e.*, 7 years, in the decree as it at present stands; while on this appeal we have no information on the point.

We reject the appeal with costs. One gold mohur is allowed for pleader's fees.

The 12th February 1875.

Present:

The Hon'ble E. G. Birch, *Judge.*

Tenants at will—Notice to quit.

Case No. 1156 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Moorshedabad, dated the 10th March 1874, *reversing a decision of the Moonsiff of Jungeepore, dated the 23rd June* 1873.

C. G. D. Betts and others (Plaintiffs) *Appellants,*

versus

Jamie Shaikh (Defendant) *Respondent.*

Baboo Sreenath Doss for Appellants.

Baboo Oomesh Chunder Banerjee for Respondent.

Even in the case of a tenant from year to year, the landlord cannot evict without giving previous notice to quit.

To be reasonable, a notice must not be peremptory, but must fix a time within which the ryot is required to quit the land.

In this case the Subordinate Judge has found that reasonable notice was not given to the tenant to quit the land; and that the plaintiff's witness says that the plaintiff simply asked the defendant to quit on two occasions, once in Choitro 1278 and once in Assin 1279, and that immediately. This the Subordinate Judge remarks is not a proper notice; and he dismissed the plaintiff's suit on that ground. The Subordinate Judge also says at the end of this judgment that the notice is not a legal notice: and upon this inaccuracy of expression a ground for special appeal has been founded. If by legal notice the Subordinate Judge means a notice required by law, it is contended that no notice is required by Act VIII of 1869 B. C. to be served upon a ryot not having a right of occupancy. It seems to be now established that notice is upon ordinary principles of justice necessary even in the case of a tenant from year to year (see Ruling in Volume VII, Weekly Reporter, page 152, cited by the Subordinate Judge). In that case it was held that as no notice had been given, and no demand for possession made, the land owner could not treat the tenant as a trespasser. That such notice is in ordinary

Digitized by Google

cases necessary is I think also shown by the decision reported at page 401 of the 20th Weekly Reporter. That case has been cited here in support of the appellant's contention, but it seems to me that instead of supporting it, it is directly against it, for it is there said that but for the peculiar circumstances of that case it would have been necessary to remand it to have the question whether notice had been given tried.

The basis of the Subordinate Judge's finding in this case is that the notice given was not a reasonable one, inasmuch as it did not fix the time within which the defendant was required to quit the land: and he also says that at the time of giving the second notice to quit, the defendant's rice crop was on the ground: and, as the Subordinate Judge points out, a peremptory notice to quit at that time cannot be considered a reasonable notice. It cannot be said that there is an error in law in this finding; and the special appeal must be dismissed with costs.

The 13th February 1875.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Succession — Change of Habitat — Dayabhaga and Mitakshara — Letters — Evidence Act, 1872 s. 74—Nephews of Half-blood.

Case No. 48 of 1867.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 24th December 1866.

Prithee Singh and others (Plaintiffs) *Appellants,*

versus

The Court of Wards on behalf of Mussamut Sheo Soonduree (Defendant) *Respondent.*

Messrs. R. T. Allan and *C. Gregory* and *Baboos Mohinee Mohun Roy, Nil Madhub Sen,* and *Hureehur Nath* for Appellants.

Mr. J. P. Kennedy and *Baboo Unnoda Pershad Banerjee* for Respondent.

When lands situate in one district are arbitrarily transferred by Government to another having a different system of law in matters of succession, the owners of those lands cannot be presumed to change their observances with their districts; the presumption being against such change.

A nephew of the half-blood is excluded from succession by brothers of the whole and half-blood.

Letters between district authorities are public documents forming a record of the acts of public authorities, and as such admissible as evidence under Act I of 1872 s. 74.

Glover, J.—THIS suit was decided by us on the 27th of July 1867 in favor of the plaintiff Prithee Singh. On the defendant's appeal to the Privy Council our order was modified, and we were directed to cause the following issues to be tried by the Court of original jurisdiction pursuant to the provisions of Section 354 Act VIII of 1859.

These issues were—

(1). Whether Someer Singh left any and what legitimate sons other than Manick Singh in the pleadings mentioned and the respondent, and if so, whether they are living or dead, and if any of them are dead when they respectively died, and whether they have left any and what male descendants.

(2). And whether the estate of Someer Singh which was formerly within the limits of Zillah Beerbhoom having been transferred to Zillah Bhaugulpore, the succession thereby becomes liable to be regulated by the law of the Mitakshara, or whether by reason of any local or family custom such succession, notwithstanding the transfer, continues to be governed by the law of the Dayabhaga.

On the first issue, the Judge found that Someer Singh left six legitimate sons, including Manick and Prithee, and that of the four brothers, Darbar, Gazie, Huree and Teeluk, the three first died without issue, and that Teeluk, who died after them, left four sons who are now alive. The Judge found that Gazie and Huree died first childless; that Doorbejoy, the son of Manick and father of the respondent Sheo Soonduree, and Darbar were killed in the Sonthal insurrection, and that Teeluk survived for some time after that event.

On the second issue the Judge found that the family of Someer was a Bengalee one and governed by the law of the Dayabhaga, and he calculated Prithee Singh's share of the estate to be one-sixth.

Prithee Singh appeals on two grounds—

(1). That the finding as to the family of Someer being governed by the Dayabhaga is incorrect, and that the evidence proves that the family came from the West, and was governed by the law of the Mitakshara; and

(2). That the Judge was wrong in finding that Teeluk survived Doorbejoy, and

Digitized by Google

in taking as evidence the documents mentioned in the judgment.

The objection (in paragraph 12 of the petition of appeal) that the Judge ought not to have found that Teeluk, Huree, Darbar and Gazie were legitimate sons of Someer, was not proved.

It will be convenient to take the second issue first in order, and on this we think that the Judge was right, and that the weight of evidence is decidedly in favor of the family having been always governed by the law of the Dayabhaga. There is no proof that Someer Singh's ancestors ever migrated from a district in which the Mitakshara law prevailed. Some of the appellant's witnesses say, no doubt, that they came from the West, but they give no particulars, and it would appear on the contrary that the family descended from some petty hill chieftain of the Beerbhoom District, and were never located in any other province. It is more than probable that their forefathers were the aboriginal inhabitants of the place, and were Hindoos in scarcely anything else but name. It is in evidence that all their principal ceremonies have been all along and are still performed by Bengalee priests; that their marriages and sradhs are celebrated after the Bengal manner, and that their worship is conducted in the same way. No one, we think, can read the evidence of the appellant's witnesses without remarking that, when speaking of the law of the Mitakshara, they were deposing to what they were altogether ignorant of, and that as a matter of fact they knew no difference between the two systems of law.

We know of no authority, and have been shown none, to the effect that when lands situate in one district are arbitrarily transferred by Government to another having a different system of law in matters of succession, that the owners of those lands are to be presumed to change their observances with their districts. The presumption we understand to be quite the other way, and it would be for the appellants to show that Someer Singh's family on being transferred from Beerbhoom, a Bengal District, to Bhaugulpore, a Behar one, changed the law under which they had been heretofore living to that of their new habitat. This has not been attempted, and they have failed to show that the law of the family was originally the Mitakshara, and that they have kept to it all along, notwithstanding that for many years they were residents of a part of the country where the law of the Dayabhaga undoubtedly prevailed.

The Judge has given a careful resumé of the evidence on both sides, and it is not necessary for us to recapitulate it. On that evidence we find that Someer Singh's family was always governed by the law of the Dayabhaga, the *lex loci*, and that the succession should go as provided for by that law.

We now come to the first issue. And it having been admitted that Someer Singh left six legitimate sons, the question is, as the Judge remarks, mainly narrowed to the dates of their several deaths, as upon this will depend the amount of share to which Prithee Singh, one of those sons, is entitled.

We agree with the Judge in thinking it proved that Teeluk Singh survived all his brother and half-brothers but Prithee. It is admitted that Doorbejoy and Darbar survived Gazie and Huree, and were themselves killed in the Sonthal insurrection, and it will be a question in the calculation of shares as to the dates of their respective deaths. But if Teeluk survived them all, his sons would take a part of their shares, and Prithee's portion would be assessed accordingly.

Mr. Gregory, for the appellant, has objected strongly to the Judge's reception as evidence of certain letters which passed between the district authorities shortly after the Sonthal insurrection was quelled, and which go to show that Teeluk Singh was alive at that time. It appears that the original letters were produced in Court, and we are not shown that the appellant took any objection to their genuineness, or that the copies of them which were filed with the record were not true copies. We think that, under Section 74 Act I of 1872 (The Evidence Act), these letters would be public documents forming a record of the acts of public officers, to wit, the Deputy Commissioner, the Collector, and the Commissioner, and as such would be receivable in evidence. But besides this there is, we consider, very fair evidence as to the existence of Teeluk Singh after the insurrection. It is not denied that his sradh was performed at least one year after that date, and if he had as the plaintiff asserts died before the insurrection, there is no reason why his sradh should not also have been performed before according to usual custom, for one of the plaintiff's witnesses says that Teeluk died six or seven months before the disturbances began.

Then remains the calculation as to shares. Mr. Kennedy for the respondent contends

Digitized by Google

that Prithee Singh cannot, under any circumstances, be entitled to more than he has got, as he is barred by the statute of limitations, Manick having held the entire property adversely to his brothers for more than twelve years before the date of suit. The answer to this objection seems to be plain. The family is admittedly still a joint undivided one, and therefore Manick's possession would be the possession of all the brothers, and there would be no adverse holding.

Each of the six sons of Someer had one sixth of the property. When Manick died his share went to his son Doorbejoy. We are not told the dates of the decease of Huree and Gazie, but it is in evidence that they both died before Doorbejoy, Teeluk, Durbar and Prithee. Their shares, therefore, two-sixths would have gone in equal parts to the surviving three brothers, Durbar, Teeluk and Prithee, the nephew Doorbejoy being the grandson of Someer by his first wife, and therefore of the half-blood only to Gazie and Huree, being excluded by the brothers of the whole and half-blood, *vide* Kylash Chunder Sen *vs.* Gooroo Churn Sen, III Weekly Reporter, 43. Doorbejoy and Durbar were killed on the same day, and there is no reliable evidence to show which of the two died first. Doorbejoy's share would go to his daughter, and Durbar's would be divided between Teeluk and Prithee. On Teeluk's death, his accumulated shares would go to his four sons.

Thus on Gazie and Huree's death, Durbar, Teeluk and Prithee would each hold a 4 annas $5\frac{3}{4}$ pie share of the estate. On Durbar's death, Durbar's portion would go in equal shares to the two surviving brothers Teeluk and Prithee, whose shares would then be, in the language usually employed in speaking of division of estates, 6 annas 8 pies each. The Judge does not explain how Prithee would succeed to a one-sixth share only.

We are of opinion, therefore, that Prithee should be declared entitled on a partition to khas possession of a 6-anna 8-pie share of Someer's estate. The property being still joint and undivided, we cannot give him a decree for khas possession, but he will be entitled to separate possession of that share on the estate being divided, and until then he will be entitled to collect a 6-anna 8-pie share of the rents.

Each party will pay their own costs incurred in the Privy Council and in the Courts after remand.

The 18th February 1875.

Present :

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Limitation—Act IX of 1871 *sch. II Art* 167.

Case No. 423 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Shahabad, dated the 21*st August* 1874, *affirming an order of the Moonsiff of Sasseeram, dated the* 16*th May* 1874.

Chundee Roy and others (Judgment-debtors) *Appellants,*

versus

Isree Pershad Narain Singh Bahadoor (Decree-holder) *Respondent.*

Baboo Roop Nath Banerjee for Appellants.

Mr. C. Gregory and *Moonshee Mahomed Yusoof* for Respondent.

To meet a plea of limitation a judgment-debtor was held entitled to a deduction of the time occupied by him in prosecuting his claim in the Civil Court according to the directions of the Collector.

Kemp, J.—THE grounds now taken by the pleader who appears for the appellants were not raised at all in the first Court, and only in part before the Judge. In the first Court the contention as between the decree-holder and the judgment-debtor was whether the judgment-creditor was to be allowed the time which was occupied in litigating his claim as against the purchaser from Goburdhun, the surety. The Moonsiff held that that time ought to be deducted, and that, deducting that period, the present application, which was made on the 21st July 1873, was in time, inasmuch as the litigation with reference to the purchase by Gunessur Pershad did not terminate until the 28th of July 1871. In appeal before the Judge, the judgment-debtor attempted to raise a further question as to whether the decree was not barred, nothing having been done between the 30th August 1862 to the 23rd of August 1865. The Judge says that this is a new point raised for the first time before him, and that the papers were not before him which would enable him to decide that question. He, therefore, dismissed the appeal. Then in this Court another point is raised, that nothing was done from the 30th of November 1865 to 1869, but this was not raised in the grounds of special appeal

Digitized by Google

or taken in the Court below. We think with the Court below that the judgment-creditor was entitled to the time which was occupied in prosecuting his claim in the Civil Court according to the directions of the Collector. These proceedings terminated on the 28th of July 1871, and the present application, dated the 21st July 1873, is therefore in time.

The special appeal is dismissed with costs. Pleader's fees two gold mohurs.

The 18th February 1875.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Act VIII (B.C.) of 1869 *s.* 29—"*Months*"—*Act V (B.C.) of* 1867.

Case No. 296 of 1873.

Regular Appeal from a decision passed by the Officiating Subordinate Judge of Rungpore, dated the 18*th September* 1873.

Luchmeeput Singh Bahadoor (Plaintiff) *Appellant,*

versus

Raj Coomaree Dabee (Defendant) *Respondent.*

Mr. R. T. Allan and *Baboos Sreenath Doss* and *Rash Beharee Ghose* for Appellant.

Baboo Tarinee Kant Bhuttacharjee for Respondent.

The "months" mentioned in Act VIII (B.C.) of 1869 s. 29, mean calendar months according to the English calendar.

Phear, J.—We are bound by the Bengal Council Act No. V of 1867 to read the "three months" of Section 29 Act VIII (B.C.) of 1869 as meaning calendar months; and we think, that in the absence of any thing tending to show the contrary, they must also mean calendar months according to the English calendar. The decision in the 18 Weekly Reporter, page 403, and also that in the 13 Weekly Reporter, page 183, both of which have been referred to, support this view. It follows that the decision of the Court below is a right decision. The appeal is, therefore, dismissed with costs.

The 18th February 1875.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Ijmalee Property—Suit to recover an undivided Share—Review—Special Appeal.

Case No. 721 of 1874.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 5th January 1874, *reversing a decision of the Subordinate Judge of that District, dated the* 18*th December* 1871.

Parbutty Churn Doss and others (Defendants) *Appellants,*

versus

Protap Chunder Sen and another (Plaintiffs) *Respondents.*

Mr. M. M. Ghose and *Baboos Mohinee Mohun Roy, Nullit Chunder Sen,* and *Bharut Chunder Dutt* for Appellants.

Mr. J. T. Woodroffe and *Baboos Rash Beharee Ghose* and *Doorga Mohun Doss* for Respondents.

A suit to recover possession of an undivided share of a putnee talook, where the title to the share as against the zemindar depends upon a grant made to the plaintiff and others ijmalee, cannot rightly proceed until the co-sharers are made parties.

Where a District Judge, as the Lower Appellate Court, reviewed his predecessor's judgment and reversed his decision, and the High Court in special appeal saw no ground on which it could rightly disturb the judgment in question, it set aside the review and restored the judgment.

Phear, J. — In the plaint this suit is described as a suit to recover possession together with mesne profits of a 5-anna share of the putnee talook Mouzahs Baria and Alinuggur, which talook bears a sudder jumma of Rs. 409-7, and appertains to a certain zemindaree formed of a 10-anna odd krant share of Pergunnah Baroda khat.

The plaint goes on to say that the aforesaid share (*i. e.*, the 5-anna share) of the entire talook had in the time of former zemindars been created a miras talook at the permanent jumma of Rs. 102 odd; that afterwards Government having purchased the zemindaree at auction confirmed and acknowledged the aforesaid talookdaree right and repeatedly granted the putnee settlement of the 16 annas of the two mouzahs to the

Digitized by Google

plaintiff's father Kali Churn Sen and others in ijmalee: that under this settlement Kali Churn Sen (alone) held the share in suit (*i.e.*, the 5-anna share of the entire settled putnee): but that the defendant having purchased the zemindaree right of Government in Agrahan 1270 illegally, in the same month, ousted Kali Churn from the 5-anna share of the talook which he thus held, and on this ground, Kali Churn being dead, the plaintiff, his son, seeks to recover back from the defendants this 5-anna share.

In the defendants' written statement it is first objected that the questions of right raised by the plaintiff in the present suit are the same as those which were heard and determined adversely to the plaintiff in a suit which the present plaintiff's father Kali Churn Sen brought against the present defendants in the Collector's Court, a Court competent to entertain them, and that therefore they cannot now be raised again. It is then, amongst other things, stated that the Government, after purchasing the zemindaree in 1835 at an auction sale for arrears of revenue, set aside, as it had a right to do, all the encumbrances on the zemindaree, and amongst them the putnee talook in question: that it refused to make other than temporary settlements with the talookdars; that it never in fact recognized the talookdar's rights; these rights are therefore legally put an end to; and moreover the plaintiffs are barred by lapse of time from questioning the decision of the Government in this matter.

It is finally added that the defendants had no hand in dispossessing the plaintiff's father: that the Government was in khas possession when the defendants purchased, and they took over that possession and have been since holding it in good faith.

In a passage of the plaint, which has not yet been referred to, it is admitted that the plaintiff's father Kali Churn, after being dispossessed of the property which is the subject of the present suit, brought a suit in the Collector's Court against the present defendants seeking to recover possession of the same property, and the Collector's Court entertaining the suit under Clause 6, Section 3, Act X of 1859, dismissed it.

The first question, therefore, between the parties in the present suit is the question whether the decision of the Collector's Court effected a *res adjudicata* in respect of the plaintiff's right to recover possession.

It is to be observed that the plaintiff does not set up any right to the talook independent of the consent of the Government after the purchase of the zemindaree. The plaintiff's case is that the Government, after acquiring the zemindaree by auction-purchase, recognized and assented to the talookdaree rights of his father and his co-sharers. The defendants say that the Government put an end to those rights. The substantial question in the suit on the merits is, did the Government put an end to the talookdaree rights, &c.

The last question is, did the defendants turn the plaintiff's father out of possession or keep him or the plaintiff out of possession.

In the Court of first instance, the Subordinate Judge seemed to be of opinion that the principal matters of title alleged by the plaintiff were made out by him, but he thought that the evidence failed to attach this title to the subject of his claim. His words are:—

"As talookdars of a 5-anna share which "was reduced into a distinct talook, and the "sudder jumma of it Rs. 129-15-6 payable "with the jumma of the other shares, "amounting in all to Rs. 409-7, the plaintiffs "want 5-16ths of the lands in villages Baria "and Alinuggur. From this it is manifest "that though the plaintiffs are owners of a "distinct small talook in villages Baria and "Alinuggur, they want to hold 5-16ths of "the lands of those villages jointly with the "other talookdars who have 11-16ths share. "Plaintiffs' talook contains a small area of "20 droons 2 kanees 7 gundas 2 kaks 15 "teels, which has been distinctly set apart "from the rest of the talookee lands that "belong to the other talookdars who paid "their sudder jumma jointly; therefore "plaintiffs cannot be allowed to enter the "villages armed with a decree and take "5-16ths of the lands. The plaintiffs' pre-"decessors, as is evident from the testimony "of their own witnesses, held the lands of the "village apart, and made separate collections; "therefore they cannot sue for the joint "possession of the 5-16ths of the villages. "They ought to have claimed the 20 droons "odd kanees which really belonged to their "talook, and to which the limitation of 12 "years could not apply. To decree the 20 "droons odd kanees would be contrary to "the prayer in the plaint: besides, it would "be hard to ascertain the land in the villages, "as the boundary of the land is not given in "the plaint, nor have the plaintiffs adduced "the survey chitta whereby their talook of "20 droons and odd kanees has been demar-"cated, and set apart from the portions of

Digitized by Google

"the other talookdars who have 11-16ths "share of the lands of the same villages. "To decree for the plaintiffs under such cir- "cumstances would not only be decreeing "for what they do not want, but it would be "also impossible to execute the decree. The "case is, therefore, dismissed with costs."

This seems to us a very right conclusion, and as the plaintiff did not, so far as we can learn, at any time ask that his claim might be amended, or that he might have leave to bring a fresh suit, the result was inevitable that the suit should be dismissed unconditionally.

On appeal against the decree of the first Court, the Officiating Judge of the District, Mr. Allen, did not dissent from the Subordinate Judge's view of the evidence upon the footing of which the suit had been dismissed below, but he held further that the suit ought to be dismissed on the ground that inasmuch as the subject of suit was an undivided share of two entire mouzahs, the title to which share as against the zemindar, according to the evidence, depended upon a grant made to the plaintiff and others ijmalee, the suit could not rightly proceed until the co-sharers were made parties. This ruling also seems to us to have been correct. It was specially necessary in this case that all the parties interested in the subject of suit should be before the Court, because while the plaintiff's evidence showed that, as against the other owners of the entire talook he was entitled to a specific quantity of land only in the talook, by his plaint he was claiming from his zemindar an undivided share of the whole talook. Moreover, he was seeking to compel his zemindar to recognize the independence of his, the plaintiff's, share in the talook upon evidence which showed that in terms at any rate the talook was granted ijmalee to plaintiff's father and others.

Neither of these conclusions would necessarily have effected a judicial determination of the matter of suit between the parties had the plaintiff in due time applied that his suit should be set right in the Court of first instance. It does not appear that he did so even in the Court of appeal.

The Judge, however, also decided the principal issue on the merits of the case against the plaintiff. He expressly stated that the evidence, read by the light of a certain decision of the Privy Council which will be presently again mentioned, satisfied him that the Government, after purchasing the zemindaree, put an end to all the plaintiff's then existing talookdaree rights, and that if the Government at the same time or subsequently in the capacity of zemindar granted the plaintiff any new rights, these fell far short of that which he was claiming in this suit from the defendants.

With these views Mr. Allen dismissed the appeal, and so left the plaintiff's suit dismissed unconditionally. We have been unable to discover any such error in Mr. Allen's judgment or in his treatment of the case as would be sufficient to justify us in disturbing his decision on special appeal.

This judgment was passed on 28th August 1873. Shortly after this date Mr. Fowle, Judge of the District, for whom Mr. Allen had been officiating, returned to his duty, and on the 22nd December 1873 he admitted an application for a review of his predecessor's judgment.

On review of the judgment Mr. Fowle completely reversed the decision of Mr. Allen, and decreed the plaintiff's claim with costs and interest at 6 per cent. per annum, and this decision has come up to us on special appeal.

Neither the grounds upon which the review was granted, nor the grounds upon which the final decision was based, are very clearly given by Mr. Fowle. He dwells much upon the erroneous interpretation which he thinks Mr. Allen put upon the word talook as understood at the present time, and thinks that the impression created by the error into which Mr. Allen had fallen runs through the whole of his judgment. It seems to have escaped Mr. Fowle's notice that Mr. Allen expressly limited his remarks to the meaning of the word as used in the old Regulations. But whether Mr. Fowle be right or not in thus convicting Mr. Allen of error, it does not appear to us that the error if made could in any substantial degree have influenced Mr. Allen's conclusions on the questions as to which his finding has been stated. It clearly did not materially affect the conclusion that the plaintiff's evidence of exclusive enjoyment of land did not serve to prove his right to an undivided share of two villages. Neither does it seem that it could have affected his conclusion based on the evidence that the share of property which the plaintiff sought to recover, by whatever name it might be called, had never been separately recognized by the zemindar, but was an undivided share of a tenure enjoyed with others, and that therefore these others were necessary parties.

Still less, if we may say so, could it have led him astray in regard to his conclusion

Digitized by Google

drawn from the evidence that the Government, after it bought the zemindaree, put an end to all the plaintiff's previously existing rights.

But this error apart, the Judge appears to have been also of opinion that the decision of the Privy Council in a certain so called analogous case, wherein the Judge says the *particulars* were the same as in this case, rendered it obligatory on Mr. Allen to find upon the evidence which is in this record that the Government did not at any time, after obtaining the zemindaree, put an end to the previously existing talookdaree rights.

As to this, it is enough for us to say that the two principal ingredients in the case referred to, upon which their Lordships of the Privy Council mainly rested their judgment, are absent from the present. By the plaintiff's own admission the talookdaree right which he asserts in this suit was created in Magh 1234 (1828) and *not* before 1822, and so far as the evidence on the record goes to show the Government after becoming zemindar never took any proceedings in the way of enhancing rent. But in the former case it was because Mr. Colvin's letter indicated a disposition on the part of Government to recognize rights of earlier date than 1822 as distinguished from those of later date, and because Government afterwards took steps to enhance the rent of the tenure in question, thus impliedly assenting to its continuance in a mourasee character; that the Privy Council thought that the right conclusion of fact was that the Government had never put an end to the entire tenure, though it had had the right to do so, if it had chosen. It plainly does not follow that the Privy Council would have come to the like conclusion on the materials which form the present case.

It seems to us, therefore, that neither the error which Mr. Fowle imputes to Mr. Allen in regard to his conception of the meaning of a "talook," nor the decision of the Privy Council in the case cited or both together serve to show that it was requisite for the ends of justice that Mr. Allen's judgment should be reviewed, and we cannot find that Mr. Fowle had any other grounds than the grounds which those afforded for granting the review.

Mr. Fowle's own judgment on the merits is exceedingly short, and does not deal with the evidence at all. He furnishes us with no reasons whatever for thinking that his view of the effect of the evidence is in any respect better than that of Mr. Allen's; certainly none for thinking that Mr. Allen's judgment was so wrong that it was necessary for ends of justice that it should be reviewed and altered.

On the whole, we are of opinion that there ought to have been no review, and that Mr. Allen's judgment ought to remain the judgment of the Lower Appellate Court. And we have already said that there is no ground apparent to us upon which we could rightly disturb that judgment on special appeal.

In this view, it is not necessary for us to consider the question whether or not this suit is barred by the decree in the former suit between the same parties in the Revenue Court. Neither do we express any opinion upon the merits of the case, which do not come before us on this special appeal.

The 19th February 1875.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Trust Property—Collector—Act XL of 1858 s. 7—Removal of Guardians or Managers.

Case No. 380 of 1874.

Miscellaneous Appeal from an order passed by the Judge of East Burdwan, dated the 24th August 1874.

Rajessuree Debia (Opposite Party) *Appellant,*

versus

Jogendro Nath Roy (Petitioner) *Respondent.*

The Advocate General, and *Baboos Kalee Prosunno Dutt, Sham Lall Mitter* and *Luckhee Chunder Bose* for Appellant.

Messrs J. T. Woodroffe and *C. P. Hills* and *Baboo Rash Beharee Ghose* for Respondent.

Where a trust is created under a will for certain purposes mentioned in the will, *e.g.*, the maintenance of religious worship, charitable institutions, &c., the properties belonging to the trust cannot be taken charge of by the Collector under Act XL of 1858.

An application for the removal of guardians or parties appointed to take charge of the estate of a minor under Act XL of 1858 s. 7, must be supported by proof of malversation or misconduct such as would afford sufficient ground for removal.

Kemp, J.—On the 19th of May 1867 Saroda Pershad Roy died. He left a will

Digitized by Google

dated the 17th of September 1865. Under that will he appointed the appellant before us, his wife, Sreemutty Rajessuree Debia, and the opposite party Jogendro Nath Roy, as managers of his estate and guardians of the minor son Lulleet Mohun Roy. Under this will he created a trust for the following purposes,—namely, for the worship of the idol Shib Thakoor, which was constituted by his grandfather and his mother in the family-house; for the support of a dispensary which had been erected at his expense with the sanction of Government, and also for the purpose of providing food and raiment in perpetuity for 50 persons, lame, diseased, or otherwise deserving of charity. For these purposes several properties paying a jumma of no small amount or within a few rupees of 10,000 rupees per annum, were set aside; these properties will be found fully set out in the *tupseel* appended to the will. It appears that everything went on smoothly from the date of the death of Saroda Pershad Roy in 1867 until the 10th of August 1874. On that date, Jogendro Nath Roy petitioned the Judge of Burdwan to the effect that the lady Sreemutty Rajessuree and himself could not agree; that this disunion had led to confusion in the management of the estate; that the lady had misappropriated and was still misappropriating the assets of the estate. He, therefore, prayed the Court to call upon her to show cause why the certificates which had been granted to her under the provisions of Act XL of 1858 and Act XXVII of 1860, should not be recalled. The Judge, upon this petition, without taking any evidence and simply upon the affidavit of Jogendro Nath Roy, which is in the terms of the petition, issued a perwannah to the Nazir of his Court, under which that officer was directed to carry out the orders contained in it before the lady Rajessuree Debia had any opportunity of showing cause against the petition upon which Jogendro Nath obtained a rule. The perwannah is to this effect: that Jogendro Nath has stated that he cannot agree with you, Sreemutty Rajessuree; that in consequence considerable confusion in the management of the estate has accrued; that you have, and are still, misappropriating the assets of the estate; and therefore he prays that the estate may be, under the provisions of the 14th clause of the will, taken under the protection of the Court of Wards. The Judge further recites in the perwannah that this is supported by the clause 14 of the will; and therefore "you are ordered to "show cause within ten days why the certifi- "cates granted to you" under the abovenamed Acts should not be recalled. "You are fur- "ther ordered that until final orders have been "passed upon the petition of Jogendro Nath "Roy, not to alienate or in any other way "misappropriate the estate of Saroda Pershad "Roy; and you will give free access to the "Nazir into the premises occupied by you "for the purpose of preparing lists of the "property of Saroda Pershad Roy." On the same date, namely,—on the 10th of August 1874,—a further perwannah was issued to the Nazir that he was to make an entrance into the premises (বাড়িতে প্রবেশ করিয়া) of the late Saroda Pershad Roy and make a list of the whole of the properties belonging to his estate. That the Nazir carried out the orders of the Court most effectually is clear from the inventory filed on the record, for on cursorily glancing over that paper I find that the very wearing apparel of Rajessuree Debia and her sister were seized by the Nazir; they were found in an old petarah and removed. It appears that Rajessuree remonstrated against the harshness of these proceedings, but that remonstrance, as far as I can ascertain, appears to have been without effect; and the whole of the moveable property including pots and pans, in fact every thing that could be found, was removed and made over by the Judge's order to the Collector. The roobakaree of the Judge to that effect is on the record. The order of the Judge, which is now appealed against, is dated the 24th of August 1874. The Judge says that when the case was called on, the pleaders for Rajessuree Debia, the appellant before us, applied for a postponement on the ground that their Counsel, owing to some accident, had been unable to attend. It appears that Mr. Branson, who appeared for Jogendro Nath, although instructed to oppose this application, left the matter to the Court and did not press it. The Judge then goes on to observe that he gave the pleaders one hour's time to decide whether they would file any objections to the petition filed by Jogendro Nath Roy, but that they declined to put in any answer, probably because they thought it better to press for a postponement to enable them to obtain the advise of Counsel as they were themselves opposed by Counsel; but be that as it may, the Judge would not allow any further time, and holding that it was very necessary that the estate of the minor should be placed under efficient management, and observing further that it was within his personal knowledge that criminal cases were

Digitized by Google

multiplying between the parties, although it is not shown who instituted those criminal cases, thought proper to direct, under Section 21 of Act XL, the Collector to take charge of the whole estate of the late Saroda Pershad Roy. It is said by Jogendro Nath Roy in his affidavit, that the minor Lulleet Mohun Roy, who, I may observe, is his son-in-law, and who is admittedly about 15 or 16 years of age, joined him in the application, but whether he joined him or not is a matter of very little consequence.

It appears to us that the Judge was wrong in directing the Collector to take charge of the whole of this estate under the provisions of Act XL of 1858. It is clear from the terms of the will of the late Saroda Pershad Roy, that certain properties have been dedicated to the worship of Shib Thakoor, and that a trust has also been created with respect to other properties for the purposes detailed in the will,—namely, the maintenance of the dispensary and of the charitable institution set forth at the commencement of this judgment. Therefore the Collector clearly could not, under Act XL, take charge of such property. Then under Section 7 Act XL of 1858, Jogendro Nath Roy and the lady Rajessuree Debia were appointed in virtue of the will of the late Saroda Pershad Roy; they were willing to undertake the trust, and it was compulsory on the Court under that Section to appoint them as guardians to have charge of the property of the minor. Under Section 19 of the Act, the parties appointed under Section 7 by virtue of a will or deed may be sued in the Civil Court by any relative or friend of the minor, at any time during the continuance of the minority, for accounts, and under Section 21 the Civil Court can, for any sufficient cause, recall any certificate granted under the Act, and direct the Collector to take charge of the estate. In the case referred to before the Full Bench, to be found in Volume VII, Weekly Reporter, two questions were put to the Full Bench,—namely, whether, under any circumstances, a certificate granted under Section 7 could be recalled summarily under Section 21; and secondly, whether such certificate could be recalled summarily without any accounts taken in a regular suit under Section 19. The Full Bench held that the Court could, under the provisions of Section 21, recall a certificate, although that certificate had been granted under Section 7, and although no civil suit had been brought under the provisions of Section 19; but the Court in the judgment delivered by Sir Barnes Peacock, referring to a decision by Justices Steer and Campbell, reported in Marshall's Reports, page 240, entirely concurred with those learned Judges in holding that any application for the removal of guardians or parties appointed to take charge of the estate of a minor under Section 7, must be supported by proof of malversation or misconduct such as would afford sufficient ground for such removal. Now, in this case, we find in the first place that, under the will of Saroda Pershad, a trust was created for certain purposes mentioned in the will, and that the properties belonging to the trust cannot be taken charge of by the Collector under Act XL of 1858; and in the second place that Sreemutty Rajessuree, without having been given sufficient time to show cause, and without any evidence or proof of any malfeasance or misappropriation on her part, has been summarily removed from the position of trust which she holds under the will of her late husband. We think, therefore, that the order of Judge in this case cannot be supported and that it must be reversed. The Judge will be directed to restore the property to its former position—that is to say, to the possession of the parties from whom it was taken.

The appeal is decreed with costs. Pleader's fees five gold mohurs.

The 4th January 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Rent Suit—Cause of Action—Limitation.

Case No. 10 of 1874.

Regular Appeal from a decision passed by the Subordinate Judge of Jessore, dated the 3rd November 1873.

Buroda Kant Roy Bahadoor (Plaintiff) *Appellant,*

versus

Chunder Coomar Roy and others (Defendants) *Respondents.*

Baboos Ashootosh Dhur and *Obhoy Churn Bose* for Appellant.

Digitized by Google

Baboos Unnoda Pershad Banerjee, Sreenath Doss, and *Bungshee Dhur Sen* for Respondents.

Certain suits brought in the Collector's Court for rent of 1270 and subsequent years having been dismissed in consequence of the defendant's plea that the whole of the estate had been resumed, and that there was no distinct land for which plaintiff was entitled to any separate rent, plaintiff was obliged to bring a civil suit to establish his right to recover those rents. Having obtained a decree, he brought a suit for arrears of rent from 1271 to 1279; but obtained a decree for the rents of three years only, the cause of action for the years previous to 1277 having been considered to be barred.

HELD that this decision was right, as there was nothing to prevent the plaintiff from including in the civil suit which he brought, or any previous suit, a claim for rent as well as for declaration of right.

Jackson, J.—THIS is a suit for arrears of rent held by the defendants under a jummai pottah within the plaintiff's zemindaree. It appears that the last rent paid by the defendants previous to this suit was for the year 1270; that suits had been brought for rents of subsequent years apparently in the Collector's Court, but were dismissed in consequence of the defendants' plea that the entire lands of Tildanga, where the land in dispute was situated, had been resumed, and that there was no distinct land for which the plaintiff was entitled to any separate rent. On that ground the plaintiff had failed to recover the rents which he had sued for, including the rents of 1271 to 1275, and the plaintiff was therefore obliged to bring a civil suit, which he did sometime in the year 1870, to establish his right to recover those rents, and that suit was brought at a valuation of Rupees 28,000, and a decree was made on the 30th December 1871, which was affirmed by the High Court on the 3rd June 1873. Plaintiff having obtained this decree followed up his advantage by bringing the present suit, which was filed on the 30th July 1873, and comprehended the arrears of rent from 1271 to 1279. The Subordinate Judge who heard this suit gave plaintiff a decree for the rents of 1277, 1278, and 1279, but he held the cause of action to be barred in respect of the remaining rents.

It is now objected in appeal before us that the plaintiff is not really barred, inasmuch as he had been prevented from prosecuting his suit for rent by the conduct of the defendants, and the case of Ranee Surno Moyee against Shushee Mookhee Burmonee,* in XII Moore's Indian Appeal Cases is relied upon. That was a very peculiar case. The defendant there, who was a putnee talookdar, had fallen into arrears of rent, and the superior landlord, Ranee Surno Moyee, brought the talook to sale. Another person became the purchaser, and the defendant had been put out of possession, and the other party, *viz.*, the purchaser, installed. Proceedings were then taken to set aside the sale of the putnee on the ground of irregularity, and ultimately the sale was set aside. The Ranee then sued the putneedar, who had recovered possession, for the rent, and that suit was held to be barred in consequence of three years having expired. The Judicial Committee held that, in the first place, it was perfectly clear that the cause of action accrued at the time at which, the sale having been set aside, the obligation to pay this sum of money revived, and also that upon the fair construction of the 32nd Section of that Act, the time had really not run. Their Lordships' view of the case was this, that "upon the setting "aside of the sale and the restoration of the "parties to possession, they took back the "estate subject to the obligation to pay the "rent; and that the particular arrears of "rent claimed in this action must be taken "to have become due in the year in which "that restoration to possession took place." Now it is quite clear that in the situation of the parties in the case of Ranee Surno Moyee, no suit could have been successfully maintained against Shushee Mookhee until she was replaced in possession of the talook on the reversal of the sale. That is not the case in the suit before us, because the tenants were in possession of the land and there was nothing to prevent the landlord from including in the suit which he brought in 1870, or in any previous suit which he had brought for the same purpose, a claim for rent as well as declaration of his right. It cannot be said, therefore, that the plaintiff was placed by the decree of the Civil Court in 1871 or 1873, and not till then, in a position to bring the present suit. We think the Subordinate Judge rightly held that the suit for arrears of rent before the year 1276 was barred, and this appeal must be dismissed. We make no order as to costs.

* 11 W. R., P. C., 5.

Digitized by Google

The 13th January 1875.

Present :

The Hon'ble L. S. Jackson and W. F. McDonell, *Judges.*

Limitation—Act IX of 1871 *Sched. II No.* 167—*Decree-holders—Execution Piecemeal.*

Case No. 429 of 1874.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Fureedpore, dated the 26th June 1874.

Faez Buksh Chowdhry (Judgment-debtor) *Appellant,*

versus

Sadut Ali Khan (Decree-holder) *Respondent.*

Baboos Mohinee Mohun Roy and *Grija Sunkur Mojoomdar* for Appellant.

Baboos Sreenath Dass and *Nullit Chunder Sen* for Respondent.

Where an application was made and proceedings taken to enforce or keep in force a decree, limitation runs from the date of such application, not from the date of the proceedings.

The purchaser of a share in a decree cannot be allowed to take out piecemeal execution; but the Court may allow the decree to be executed as a whole on his application, taking steps to protect the interests of the other decree-holders.

Jackson, J.—THERE are at least two fatal objections to the order of the Lower Court in this case, one of which is that the application was barred. No. 167 of the second schedule of the Limitation Act provides that the period of limitation in such cases is three years, which period beigns to run, where there has been a previous application to enforce or keep in force the decree, from the date of such application. Now it appears that a previous application of that nature had been made in August 1870. The application of the creditor now before us was made in September 1873, being more than three years from the date of the previous application. It is urged that, under that previous application of August 1870, proceedings had been taken, the property had been sold, and money recovered; but the Act does not allow limitation to run from the date of such proceedings, but only from the date of the application. In a recent case referred to the Full Bench,* the Court felt itself obliged to hold that a perfectly abortive application, which was meant by the execution creditor to be abortive, and under which nothing whatever had been done, would serve to keep the decree alive for three years from date of that application, and it seems to be the unfortunate result of the provisions of this Act that while, on one hand, a collusive or indolent judgment-debtor is amply protected, on the other hand a really diligent and honest creditor is placed in a far worse position than he was in under the old Act, and is in fact seriously discouraged. But that is a result for which we are not responsible, but the Legislature.

The second objection to the order is that, on this occasion, as on the previous occasion in which there was no appeal, an applicant has been made, and allowed to execute a decree against the defendant; to use the words of the Court below, "in proportion of the share purchased by him,"—that is to say, the parties have been allowed to take out piecemeal execution of this decree on the allegation that they have purchased the interests of one or more parties who are entitled, as they say, to represent the original decree-holder in various proportions. This ought not to have been done. The result of this procedure might be that the aggregate of the shares which the parties claim to execute might exceed the entire decree, which indeed appears to have been the case in the present instance. The Court could have allowed the applicant to execute the decree as a whole, taking steps to protect the interests of the other decree-holders. The order of the Lower Court is set aside with costs, five gold mohurs.

* 22 W. R., 512.

Digitized by Google

The 19th February 1875.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Contribution Suit—Decree—Judgment-debtor's Heirs.

Case No. 808 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Rajshahye, dated the 15th January 1874, affirming a decision of the Subordinate Judge of that district, dated the 31st December 1872.

Rash Munjoree Chowdhrain (one of the Defendants) *Appellant,*

versus

Radha Soondaree Dossee and another (Plaintiffs) *Respondents.*

Baboo Kishen Doyal Roy for Appellant.

Baboo Issur Chunder Chuckerbutty for Respondents.

The liability of each of the defendants in a contribution suit is not a joint but a several liability. Accordingly the plaintiff is bound to make out that the persons whom he sues have each a separate liability to him, and the decree ought to determine separately the amount of money to be contributed by each.

A deceased debtor's heir is only liable to pay the debt out of the property of the deceased which comes into his hands.

Where the debt is a judgment-debt, the proper mode of enforcing liability is not by a separate suit, but by prosecuting execution proceedings.

Phear, J.—THE plaint in this case discloses a most deplorable story of ill-founded litigation.

It appears that one Goluck Chunder Chowdhry, being liable with the present plaintiff and Gooroo Churn Sannyal and Anund Nath Sannyal and various other persons for the due payment of the Government revenues of a certain mehal, paid the whole of the revenue himself. Thereupon, he brought a suit for contribution against his co-sharers, *i. e.*, the present plaintiff and the other persons who have just been named or referred to. In that suit he obtained a decree against them all jointly for the amount of money which he had paid to Government, less his own share of the joint liability. And he executed this decree against Gooroo Churn and Anund Nath Sannyal alone. This having happened, and Gooroo Churn Sannyal having died, Prosunno Moyee Debee, as guardian of Debendro Nath Sannyal, the son of Gooroo Churn Sannyal, brought a suit against the present plaintiff and the other co-sharers of the mehal, excepting, we suppose, Goluck Chunder Sannyal, in order to obtain from them contribution to the payment which her deceased husband had made in excess of his own share. And in the second case, as in the first, a joint decree for contribution was given against all the defendants. This decree, the plaintiff says, after having been transferred through several hands, was satisfied by him, who, as he says, thereby saved the properties of his co-shareholders from the liability of being sold at an auction. And on this ground he brings a third suit for contribution against, we may say shortly, all the co-sharers who had not been plaintiffs in the preceding suits, and also one Choytunno Chunder Roy, the nephew and heir of Gourango Chunder Roy deceased, who had been one of the defendants in the preceding suits. This is the suit which is now before us.

The Lower Courts have given a decree, not precisely a joint decree, against all the defendants, but for portions of the money claimed separately against some of them and as regards the residue of that money jointly against all the rest, including among them Choytunno Chunder Roy, the heir of Gourango Chunder Roy deceased.

Now at this day it may be said that nothing is clearer than that a decree in a suit for contribution ought to determine separately the amount of money which is to be contributed by each one of the contributors respectively. The liability of each of the defendants in a contribution suit is not a joint liability: it is a several liability depending upon questions of equity and justice, between himself and all the other parties to the suit inclusive of the plaintiff. It is the very purpose of a contribution suit to prevent and displace such a succession of suits as has

Digitized by Google

occurred in the present instance. Therefore by the very case of the plaintiff, who comes into Court stating that he has been made jointly liable with others to contribute in a contribution suit, he is bound to make out that the persons whom he sues in this suit have each a separate liability towards him.

We are not called upon now to say what was the effect as between the different parties to these successive suits of the irregularities in the form of the decrees passed in them respectively. It is enough for the determination of the present appeal for us to say that the plaintiff in the present suit is bound to show what the several liability of each one of the defendants whom he now sues is, on the footing of the obligation which he makes the basis of his suit.

As regards Choytuno Chunder Roy, the plaintiff does not pretend that he was bound by the decree made in favor of Prosunno Moyee Debee. He is only sought to be made liable here as being the heir and representative of one Gourango Chunder Roy, who was one of the parties defendant bound by that decree. This being so, Choytuno Chunder Roy is not primarily liable in this suit. He is only liable to pay the debt of Gourango Chunder Roy, supposing there was any debt due from him to the present plaintiff, out of the property of Gourango Chunder Roy which has come into his hands. And the mode of enforcing a liability of that kind, if the debt has assumed the form of a judgment-debt is not by a separate suit, but by the prosecution of execution proceedings in the suit which terminated in the decree against Gourango Chunder Roy. And if we enquire further and ask what was the debt that Gourango Chunder Roy was bound to pay to the present plaintiff under the decree made in favor of Prosunno Moyee Debee, we find that there is no specification of that debt at all, and indeed could not be. That was a suit for contribution brought by Prosunno Moyee Debee. If it had any real foundation at all, the liability determined by it was the liability of Gourango Chunder Roy upon the grounds of equity and good conscience, to pay a certain sum of money to Prosunno Moyee: it could not determine any debt due from Gourango Chunder Roy to the present plaintiff. He was one of the co-defendants in that suit. That suit then did not determine any debt of Gourango Chunder Roy in favor of the present plaintiff which Choytunno Chunder Roy was bound to discharge out of the property come to his hands. And if it had done so, then, as has been already mentioned, the present suit is not the proper proceeding for the purpose of making him liable.

But it may be said that so far as Choytunno Chunder Roy is concerned, this is a suit brought against Gourango Chunder Roy deceased in the person of his representative Choytunno Chunder for the purpose, first of determining the extent of Gourango's original liability towards the plaintiff, and then of following his assets into the hands of Choytunno. If so, there is no ground stated in the plaint upon which Gourango's liability to contribute towards the money paid by the plaintiff could be measured. It is not even said that he was jointly bound with the plaintiff by the decree which was paid off: it seems, on the contrary, to be implied that Choytunno was so. And although there is a general statement to the effect that the plaintiff saved some joint properties of himself and the defendants from the liability to be sold in auction by paying the debts of the defendants, there is not the slightest indication of the actual amount by which the plaintiff had so relieved any one of the defendants in particular, or any clue given by which that amount could be ascertained. And the Court of first instance in its judgment said:—"Even in this suit none of the "parties can show such good and reliable "evidence from which the specific amounts "of liabilities of the respective parties can "be ascertained." And, in fact, neither of the Lower Courts has determined the sum of money which Gourango was bound, upon either the obligation of the joint decree or that founded on the relief of his property, to contribute towards the plaintiff's payment; the Subordinate Judge has expressly stated that it could not be determined. It is, therefore, useless to remand the case for retrial of that issue, and we have already pointed out that Choytunno can only be made liable in this suit to pay the actual debt of Gourango to the extent of the assets come to his hands.

It seems to us, therefore, for all reasons that the decree of the Lower Courts is an erroneous decree so far at least as it affected Choytunno Chunder Roy. And the present appellants are the representatives of Choytunno Chunder Roy now dead, who have been allowed to bring the present appeal.

We are of opinion that the decrees of the Courts below should be reversed so far as concerns Choytunno Chunder Roy and the suit dismissed with costs against him in all the Courts.

Digitized by Google

The 19th February 1875.

Present :

The Hon'ble E. G. Birch and W. F. McDonell, *Judges.*

Decree incapable of Execution—Act VIII of 1859 *s.* 190.

Case No. 490 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 17*th July* 1874, *modifying an order of the Moonsiff of Moonsheegunge, dated the* 21*st May* 1874.

Darbaree Sayal (Judgment-debtor) *Appellant,*

versus

Fatu Dhalee (Decree-holder) *Respondent.*

Baboo Huree Mohun Chuckerbutty for Appellant.

Baboo Kishen Dyal Roy for Respondent.

A decree giving possession of a specified quantity of land without defining boundaries is incapable of execution.

Where such a decree is made, the decree-holder's remedy lies in an immediate application to the Court to have it rectified.

Birch., J.—In this case the plaintiff sued to obtain possession of 6 kanees of land. The suit was dismissed by the Moonsiff. The plaintiff then appealed to the Subordinate Judge against this order of dismissal; and one of his grounds of appeal was that the defendant had admitted that the plaintiff was in possession of 1 kanee 11 gundas 2 cowries and 1 krant of the land. The Subordinate Judge affirmed the order of the Moonsiff as to the rest of the land, but held that the plaintiff was, upon the admission of the defendant, entitled to possession of that 1 kanee 11 gundas 2 cowries and 1 krant. He, therefore, gave the plaintiff a decree for that quantity of land. That decree it is now sought to execute, and the Judge has held that, although no boundaries are given in the decree, the plaintiff is under that decree entitled to select 1 kanee 11 gundas 2 cowries and 1 krant of land within the limits of the 6 kanees he originally sued for. Against that order this special appeal is preferred; and it is contended here that, inasmuch as the decree does not conform to the provisions of Section 190 of the Civil Procedure Code, it is incapable of execution; and it is fairly contended that if the Judge's order is allowed to stand, and the plaintiff is to be allowed to pick out a certain area of land wherever he chooses within the boundaries of the 6 kanees given in his original plaint, injustice might ensue. On reference to the decree it appears to us that it is incapable of execution: and we think we should follow the ruling to be found in 19 Weekly Reporter, page 81, in which it was held that a decree of this nature could not be executed. The decree is a recent one, bearing date the 10th June 1873. If the decree is incapable of execution, the plaintiff is himself to blame. He should have applied to the Court at once, as soon as a copy of the decree came into his hands, to have it rectified and drawn up in conformity with the requirements of the Code.

We decree the appeal with costs, reverse the order of the Judge, and declare the decree incapable of execution.

Costs one gold mohur.

The 22nd February 1875.

Present :

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Limitation Act Sched. II Art. 129—*Suit to set aside an Adoption—Act IX of* 1871 *s.* 7—*Right of Suit.*

Case No. 32 of 1874.

Regular Appeal from a decision passed by the Officiating Subordinate Judge of Hooghly, dated the 15*th January* 1874.

Siddhessur Dutt and another (Plaintiffs) *Appellants,*

versus

Sham Chand Nundun and others (Defendants) *Respondents.*

Baboos Umbika Churn Bose and *Jogesh Chunder Dey* for Appellants.

Baboos Mohinee Mohun Roy and *Bipro Doss Mookerjee* for Respondents.

In Act IX of 1871 Sched. II Art. 129, the words "adoptive father" must be construed strictly, and not so as to include mother.

Where the father died before an adoption took place, the period of limitation for a suit to set aside the adoption begins to run from the date of the adoption.

A minor on coming to age cannot avail himself of the benefit of Act IX of 1871 s. 7, in respect of a right of suit which occurred before his birth.

Jackson, J.—This is a suit brought by Siddhessur Dutt and Beharee Lall Dutt against several persons to set aside a false

Digitized by Google

and fraudulent allegation of adoption, the person whose adoption is impugned being the third named defendant, Doorga Doss Nundun. This Doorga Doss appears to have been adopted by Tripoora Soonduree, the second wife of one Syaram Nundun, so long ago as the Bengalee year 1252, in accordance with an alleged permission of Syaram, who himself died in 1251. The adoption, therefore, had taken place about 28 years before the commencement of the present suit. The plaintiffs alleged in their plaint that they have come of age respectively on the 11th Assin 1278 and the 7th Pous 1279, and that the suit having been commenced within three years after the date of their attaining majority, it is in time. The defendants objected amongst other things that the suit was barred by limitation. Upon this issue the Subordinate Judge made this observation: "It is to be "observed the defendants object that the "plaintiffs' claim is barred by limitation, but "No. 129 of Schedule II of Act IX of 1871 "provides that a suit for setting aside an "adoption may be instituted within twelve "years from the death of the person making "the adoption. Hence as Tripoora Soonduree, "the adoptive mother of the defendant No. 3, "is alive, the plaintiffs' claim cannot be "barred by limitation." Then he refers to a case in which a Full Bench of the High Court determined that the cause of action for setting aside an adoption accrues after the death of the widow making the adoption. It is to be observed that the expression "person making the adoption" is an incorrect paraphrase of the words of the Act. Art. 129 of the second Schedule prescribes the time when the period begins to run, *viz.*, "the date of the adoption or (at the option of the plaintiff) the date of the death of the adoptive father." Now this does not appear to be one of those cases in which the word "father" might be construed to include mother, and the term "adoptive father" therefore must be construed strictly. But in this case the father died before the adoption had taken place. The period, therefore, must begin to run from the date of the adoption. The Subordinate Judge, after disposing in that way of the plea of limitation, went on first upon an objection taken under Section 2 of the Code of Civil Procedure, and then upon the merits. He decided against the plaintiffs upon the merits, and the plaintiffs have appealed. But the respondents having taken an objection under Section 348 against the decision on limitation, we have dealt with that first. The plaintiffs seek to escape from the operation of Act IX of 1871 by alleging minority, which they say terminated within three years before the commencement of the suit. In order to be able to claim that benefit, they must bring themselves within the terms of Section 7 of that Act, which are these:—"If a person entitled to sue be, at "the time the right to sue accrues, a minor or "insane, or an idiot, he may institute the suit "within the same period after the disability "has ceased, as would otherwise have been "allowed from the time prescribed." Now these two plaintiffs were not minors, and were not in existence at the time that the right to sue accrued, because in this instance the right to sue accrued at the date of the adoption. There was no minor amongst the plaintiffs who was entitled to sue at the time when the adoption took place, and therefore they were not at liberty to avail themselves at a subsequent time of the benefit of the provisions of Section 7. There were other persons who at that time would be heirs of the deceased Syaram, and the right to sue which accrued to them could not be kept indefinitely postponed till the birth of the plaintiffs. This seems also to be the view taken in the case of Mrino Moyee Dabee, printed at page 43, Volume XXIII, Weekly Reporter, and the point appears so clear that it is unnecessary to go into the other points raised in appeal. We dismiss the appeal with costs.

The 22nd February 1875.

Present:

The Hon'ble A. G. Macpherson, *Officiating Chief Justice*, and the Hon'ble E. G. Birch, *Judge*.

Civil Court Ameens—Issues of Fact.

Case No. 1845 of 1874.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 15*th May* 1874, *modifying a decision of the Subordinate Judge of that district, dated the* 10*th September* 1873.

Buroda Churn Bose and another (Defendants) *Appellants*,

versus

Ajoodhya Ram Khan (Plaintiff) *Respondent*.

Baboos Sreenath Doss and *Hem Chunder Banerjee* for Appellants.

Digitized by Google

Baboos Kalee Mohun Doss and *Boido Nath Dutt* for Respondent.

A Court has no power to delegate to an Ameen the trial of one of the most important issues of fact in a case.

Macpherson, C.J.—It appears to us that in this case the judgment of the Subordinate Judge, who tried the case in the first instance, was right; and we agree with him in thinking that the suit ought to be dismissed.

In the first place, with reference to the question as to the *suzawal*, who was put in on account of default made in the payment of the rents of 1276, being allowed to remain in after the arrears due at the time of his appointment had been satisfied, we think that the construction put upon the kabooleut by the Subordinate Judge is the right construction. The kabooleut gave two remedies to the zemindar in the event of the ijaradar making default. The one was that the zemindar might cancel the lease and resume possession; and the other was that he might appoint a *suzawal*, and through him realize the arrears due. Looking at the kabooleut, we consider that the *suzawal* was to be appointed to realize the arrears due up to the date of his appointment. He was not to remain in collecting the rents for ever. Unless we put this construction upon the agreement, it would amount to giving the zemindar power to cancel the lease, resume the land, and still hold the ijaradar liable for the rent. Such a state of things was evidently not contemplated by the parties, for the agreement provides expressly that the ijaradar shall remain liable for any arrears not covered by the collections made by the *suzawal*, but it does not make any provision that the ijaradar shall continue liable for the rent in case of the lease being cancelled and possession being resumed.

The next questions are as to the amount of the collections made by the *suzawal*, and as to whether there was a default as regards the rent for the year 1276, which justified the appointment of a *suzawal*. We are of opinion that, as the case now stands before us, there is no evidence as to what the amount of the *suzawal's* collections was. The *suzawal* himself was not examined: and his accounts are not in evidence in any way. The only evidence offered is the report of an Ameen, who being sent to the place has made a *toomar* after seeing the ryots and their receipts. There has been nothing in the nature of a legal investigation into the question. And if there had been any thing in the nature of a legal enquiry by the Ameen, the Court had no power to delegate to an Ameen the trial of what was one of the most important issues of fact in the case. The Ameen was not directed to examine witnesses: he was merely required to enquire and report what he found from the ryots and the papers which they produced as receipts.

Then there is the other point which does not appear to have been taken in the first Court, but which was discussed in the Lower Appellate Court, and therefore may be referred to now. There is no evidence that the defendant ijaradar had made any default in respect of the rents of 1276 at the time that the *suzawal* was appointed. It is quite clear that before the plaintiff could succeed, it was necessary for him to show a distinct default by the ijaradar. Until he did so, the plaintiff ought not to have been allowed to proceed with his suit. The defendant was entitled to have the suit dismissed, unless the plaintiff proved his case in the ordinary manner.

The appeal is allowed, and the plaintiff's suit is dismissed with all costs.

The 22nd February 1875.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Act VIII of 1859 *s.* 243—*Refusal to appoint a Manager.*

Case No. 426 of 1874.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Gya, dated the 5th September 1874.

Oottum Singh (Judgment-debtor) *Appellant,*

versus

Ram Surun Lall (Decree-holder) *Respondent.*

Baboo Nil Madhub Sen for Appellant.

Baboos Mohesh Chunder Chowdhry and *Judoo Nath Sahoy* for Respondent.

Where a Subordinate Judge was of opinion that an application for the appointment of a manager under Act VIII of 1859 s. 243, was made only to put off payment of the debt, HELD that he was not wrong in exercising his discretion and refusing to appoint a manager.

Kemp, J.—This is an appeal from the order of the Subordinate Judge of Gya refusing to appoint a manager under the

Digitized by Google

provisions of Section 243 of Act VIII of 1859, and a special appeal will lie to this Court. The decree is against Oottum Singh alone for a sum of Rupees 24,000, to say nothing of interest. The decretal order is to this effect, that "the case be decreed on "confession of judgment as against Oottum "Singh; the mortgaged properties will be "sold, and if the sale of these properties does "not satisfy the decree, other properties of "Oottum Singh will be sold to satisfy the "said decree." It appears that the bond upon which the decree was made was executed on the 30th of August 1872, and subsequent to that bond,—that is, subsequent to August 1872,—a division took place between Oottum Singh and his co-sharers, and under that division we are informed that Oottum Singh is in possession of only two of the mouzahs mortgaged, and that the other mouzahs are in the possession of his co-sharers. Oottum Singh undertook in the Court below to obtain the consent of his co-sharers to the appointment of a manager for the whole estate, but he has failed to do so. The Subordinate Judge, exercising the discretion vested in him under the Section, and being of opinion that the application to appoint a manager was only made to put off the evil day and the payment of the debt, has refused to appoint a manager.

We think, under the whole of the circumstances of the case set out before us in the argument, that the Subordinate Judge was not wrong in this case in exercising his discretion in the way he has done. We dismiss the appeal with costs. Pleader's fees two gold mohurs.

The 23rd February 1875.

Present:

The Hon'ble G. G. Morris, *Judge.*

Right of Occupancy—Khamar Land—Act VIII (B.C.) of 1869 *s.* 6.

Case No. 380 of 1874.

Special Appeal from a decision passed by the 1st Subordinate Judge of Mymensingh, dated the 3rd December 1873, *modifying a decision of the Additional Moonsiff of Attya, dated the 26th May* 1873.

Shaikh Ashruf (Defendant) *Appellant,*

versus

Ram Kishore Ghose and another (Plaintiffs) *Respondents.*

Baboo Tarinee Kant Bhuttacharjee for Appellant.

Baboos Kishen Doyal Roy and *Rojonee Nath Bose* for Respondents.

Where a ryot proves possession for upwards of twelve years, the mere fact of his land being *khamar* does not deprive him of the right of occupancy. Before his case can be brought within the Exception in Act VIII (B.C.) of 1869 s. 6, it must be shewn whether he has held on a lease for a term or year by year.

THE point raised in this special appeal is that the Subordinate Judge committed an error in law in stating "the land is *khamar*, therefore the defendant has no right of occupancy."

The appellant contends that even if it be admitted that the land he holds is *khamar*, still as he has given evidence of possession for upwards of twelve years, it does not follow of necessity under the terms of Section 6 of the Rent Law (Act VIII (B.C.) of 1869) that he is not a ryot with a right of occupancy, and he therefore claims the 15 days' grace allowed by Section 52.

The terms of Section 6 are as follows:—

"Every ryot who shall have cultivated or "held land for a period of twelve years, "shall have a right of occupancy in the land "so cultivated or held by him, whether it be "held under pottah or not, so long as he pays "the rent payable on account of the same; "but this rule does not apply to *khamar*, "neej-jote or seer land belonging to the "proprietor of the estate or tenure let by "him on lease for a term, or year by year, "nor (as respects the actual cultivator) to "lands sublet for a term, or year by year, by "a ryot having a right of occupancy."

The Subordinate Judge in his judgment says nothing in regard to the character of the tenure held by the defendant. He does not say whether he held the tenure on a lease for a term, or year by year, and consequently the defendant is entitled to call on plaintiff to produce proof on this head, and to have the question decided whether or not his case comes under the Exception of Section 6.

A Division Bench of this Court (12 Weekly Reporter, page 278) has decided "that there is nothing *per se* in the fact of "the land being neej-jote (or *khamar*) "which prevents a cultivator from acquiring "rights of occupancy in it." In this case the first Court appears to admit that defendant has held the land upwards of twelve years, but the Lower Appellate Court says nothing on this point, nor does it determine upon the evidence adduced by plaintiff

Digitized by Google

what are the conditions upon which defendant holds the land. The case must, therefore, be remanded for determination of the issue whether or not defendant has acquired a right of occupancy in the *khamar* land which he holds from the plaintiff. According as this issue is decided will defendant be entitled or not to the privilege of 15 days' grace allowed in Section 52. Costs to abide the event.

The 23rd February 1875.

Present :

The Hon'ble G. G. Morris, *Judge.*

Rent Suit—Ejectment—Onus Probandi.

Case No. 379 of 1874.

Special Appeal from a decision passed by the 1st Subordinate Judge of Mymensingh, dated the 28th November 1873, *modifying a decision of the Additional Moonsiff of Attiah, dated the 26th May* 1873.

Shaikh Ashruf (Defendant) *Appellant,*

versus

Ram Kishore Ghose and another (Plaintiffs) *Respondents.*

Baboo Nullit Chunder Sen for Appellant.

Baboo Sreenath Banerjee for Respondents.

In a suit for arrears of rent, and for ejectment in consequence of non-payment, where defendant challenged the rate claimed as well as plaintiff's right to sue alone, HELD that the *onus* lay on plaintiff to prove his claim to the rate of rent sued for and to show that he was sole proprietor.

It is contended in this special appeal that the Subordinate Judge has committed a substantial error in law in the investigation of this case, which has produced an error in his decision on the merits.

The plaintiff sued the defendant for arrears of rent at a certain rate, and for ejectment in consequence of non-payment of the rent. The defendant objected that the plaintiff could not sue alone ; that there were other sharers in the property ; and that therefore he could not bring a suit in his sole name. He also objected to the rate of rent claimed by the plaintiff, and he said that he held at a lower rate.

In his judgment the Subordinate Judge says : "The defendant is the plaintiff's "tenant, therefore he must prove that the "plaintiff owns 6-16th share, for the exception comes from him, and he must substantiate the fact that he had paid the rent to "the extent of 10-16th to others than the plaintiff." He then goes on to say that defendant has not done this, as also that he has failed to prove the rate of rent at which he claims to hold the land.

The Subordinate Judge thus threw the onus of proof, not on the plaintiff, but on the defendant on both points,—namely, both as to the question of shares and as to the question of the rate of rent.

It is argued on special appeal that this is a defect in law.

It appears to me that this contention is right. The defendant challenged the right of the plaintiff to sue, and he also challenged the rate of rent claimed ; therefore it was incumbent on the plaintiff to show that he had a right of suit ; that he was sole proprietor of the property ; and that there were no other sharers to be joined with him as plaintiff in the suit. Consequently it was an error in law on the part of the Subordinate Judge to throw the burden of proof of these points on the defendant, and to determine the case with especial reference to the weakness of such proof. It is clear that his decision has been unduly influenced by this consideration. To what extent it was so influenced, it is impossible to say without going into the evidence.

The case must be remanded to the Subordinate Judge for retrial. Costs will abide the result.

The 24th February 1875.

Present :

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Auction-Purchaser—Liability for Rent.

Case No. 2582 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Purneah, dated the 5th August 1873, *reversing a decision of the Moonsiff of Araria, dated the* 17*th May* 1873.

Rughoobur Thakoor (Defendant) *Appellant,*

versus

Mirza Syefoollah Khan and another (Plaintiffs) *Respondents.*

Baboo Mohendro Lall Mitter for Appellant.

Mr. C. Gregory for Respondents.

Digitized by Google

The purchaser of a tenant's rights and interests at a sale in execution of a decree of a Civil Court, must, if he wishes to retain the tenure, satisfy any decree for rent for which it is liable.

Kemp, J. — THE defendant Rughoobur Thakoor is the appellant in this case. It appears that, on the 8th of December 1869, he purchased the rights and interests of one Amanut Ali in the tenure in dispute. Referring to his certificate of purchase, dated the 8th of December 1869, we find that that certificate was granted by the Moonsiff under the provisions of Section 259 of Act VIII of 1859, and the rights and interests of Amanut Ali in 51 beegahs 10 cottahs passed under that certificate of sale. The plaintiffs are co-sharers in the zemindaree. They sued the tenant Amanut Ali for rent, and obtained a decree. In execution of that decree they have sought to sell not a portion of the jote but the whole jote. We have ascertained this by referring to their petition praying for execution of their rent decree, in which they refer to the whole jote of 51 beegahs 10 cottahs. They were opposed in this application by Rughoobur Thakoor, who objected that as he had already purchased the rights and interests of Amanut Ali in this tenure, it could not be sold again in satisfaction of the plaintiffs' decree. That objection was successful, and the present plaintiffs were forced to bring this suit to have it declared that they have the right to sell the tenure in satisfaction of their decree for rent. The Moonsiff dismissed the plaintiffs' suit. The Judge has held that there is no question that rent is due to the plaintiffs; that it is also clear that the defendant has not registered his name in the plaintiffs' seristah; and that as the defendant has only purchased the rights and interests of Amanut Ali in execution of a decree of the Civil Court, and as the plaintiffs prayed for the sale of the whole tenure in satisfaction of the rent decree, the plaintiffs' claim must be decreed.

We think that the finding of the Judge is correct in law. There is a Full Bench decision to be found in Volume XII, Bengal Law Reports, page 484,* in support of this view. The plaintiffs, as already observed, had applied for the sale of the whole tenure; the rent is admittedly due, and all the defendant has purchased are the rights and interests of the former tenant Amanut Ali. Of course the defendant Rughoobur Thakoor can, if he wishes to retain this tenure, pay the money due on account of rent to the plaintiffs, and obtain a transfer in the plaintiffs' serishtah of his name in lieu of that of the former tenant Amanut Ali; but until he does so the tenure is liable for the rent admittedly due to the plaintiffs.

The special appeal is dismissed with costs.

* 21 W. R., 94.

The 24th February 1875.

Present:

The Hon'ble G. G. Morris, *Judge.*

Right of Way—Contract—Act IX of 1871 *s.* 27.

Case No. 965 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 2nd February 1874, *modifying a decision of the Moonsiff of Lushkurpore, dated 22nd August* 1873.

Kallaram Dhur (Plaintiff) *Appellant,*

versus

Joogul Kishore Surmah (Defendant) *Respondent.*

Baboo Nullit Chunder Sen for Appellant.

Baboo Kalee Kishen Sen for Respondent.

A party who claims under a contract the re-opening of a way is not required by Act IX of 1871 s. 27 to prove user for twenty years.

THE Lower Appellate Court is clearly in error in the view which it takes of s. 27 Act IX of 1871. It says: "The plaintiff, "on the strength of his contract, claims the "re-opening of the way, and has advanced "satisfactory evidence in proof of the same. "But I find that although the plaintiff can "be successful if I were to try the case on "the strength of the contract, yet when, "under Act IX of 1871, the right of way "cannot accrue unless it has been used for "twenty years, I cannot hold that the strength "of the contract is more mighty than that "of law." There is nothing whatever in this Section of the law to prevent a contract between the parties being carried into effect. The Court has found that the plaintiff has advanced satisfactory evidence in proof of the contract; therefore the decree which it originally gave in favour of the plaintiff must be made. The present decree which is appealed against, and which was made upon review, will be set aside.

The plaintiff will get a decree with costs in all the Courts.

Digitized by Google

The 25th February 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Possessory Suit—Issues.

Case No. 1669 of 1874.

Special Appeal from a decision passed by the Judge of Nuddea, dated the 15th May 1874, *reversing a decision of the Moonsiff of Meherpore, dated the 28th December* 1872.

Nigore Monee Debia (Plaintiff) *Appellant,*

versus

Mr. P. Smith (Defendant) *Respondent.*

Baboo Doorga Doss Dutt for Appellant.

Messrs M. M. Ghose and *J. S. Rochfort* and *Baboo Hem Chunder Banerjee* for Respondent.

In a suit to recover land on the allegation of wrongful dispossession, it is not necessary for plaintiff to prove that he held it free of rent; all that is required to be proved is that he was peacefully in possession and was wrongfully dispossessed by defendant.

Jackson, J.—In this case there were two main questions for decision, the first being whether the plaintiff had been wrongfully dispossessed from the land of the premises by the defendant, and the second whether such dispossession had occurred within the period fixed for the limitation of suits, that is, twelve years. The latter of these questions the Judge finds in favour of the plaintiff: not that he appears to give much credit to the evidence adduced on her side, but because he learns from the proceedings of a suit brought in the Small Cause Court by the predecessor of the defendant against one Ram Gopal, who appears to have been a co-sharer of the present plaintiff, that this Ram Gopal, who is said to have generally occupied land with her, at some former period, was described in that suit as being a resident of Shampore, and that suit was within twelve years of the commencement of the present suit. From this the Judge infers that Ram Gopal's occupation, and so also the present plaintiff's occupation, was within twelve years of the present suit. Now this Small Cause Court suit and the proceedings in it were not evidence in favour of the plaintiff against the defendant. At the outside they can only show that it was believed by the defendant's predecessor who brought the suit that Ram Gopal was then living in the village of Shampore. It would be a long step, which the Court would not be justified in taking, to assume that Ram Gopal was in occupation of the land in dispute, and certainly no inference whatever could be drawn from it of the plaintiff's occupation. The Judge then proceeds to look at the question of the plaintiff's title. On that question he decides against the plaintiff, because she failed to prove that the land was lakheraj. Now it was not necessary for the plaintiff to prove that she held the land free of rent. All that it was necessary for her to prove was that she was peacefully in possession of the holding, and was wrongfully dispossessed by the defendant. The Judge has miscarried on both these questions, and the case must therefore go back to the Lower Appellate Court for proper finding and adjudication upon the evidence.

The 26th February 1875.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Possession—Title—Lessee—Onus Probandi.

Case No. 2644 of 1873.

Special Appeal from a decision passed by the Judge of Patna, dated the 20th August 1873, *affirming a decision of the Additional Sudder Moonsiff of that district, dated the 24th March* 1873.

Beharee Sahoo and others (Plaintiffs) *Appellants,*

versus

Puryag Mahtoon (Defendant) *Respondent.*

Baboo Mohesh Chunder Chowdhry and *Moonshee Mahomed Yusoof* for Appellants.

Baboos Chunder Madhub Ghose and *Gooroo Dass Banerjee* for Respondent.

In a suit for khas possession against a lessee who sets up a title to defeat plaintiff's admitted right as zemindar, it is for defendant to prove the title so set up.

Kemp, J.—We think that this case has been decided on a wrong principle by both Courts. The plaintiffs, special appellants, are admittedly the zemindars or maliks, and the defendant does not deny that he was the plaintiffs' lessee. The plaintiffs allege that this mouzah, including all lands appertaining thereto, had been leased to the defendant, and

Digitized by Google

that amongst those lands were certain zeraat lands; that, on the expiry of the lease, the defendant gave up possession of all the lands with the exception of the zeraat lands. The plaintiffs, therefore, sue for khas possession of these lands. The defendant sets up a special allegation that he is holding these lands by purchase from third parties, who obtained their rights from the former maliks, and that the title under which the defendant is now holding is a kashtkaree title. Therefore, the onus is clearly upon the defendant, who is setting up a title to defeat the plaintiffs' admitted right as zemindar, and it is for him to prove the tenure which he sets up as defeating the plaintiffs' right as malik to khas possession. The case must, therefore, go back. The Judge will go into the case of the defendant, and will decide it after going into the evidence adduced by the defendant in support of his alleged title. Costs to follow the result.

The 26th February 1875.

Present:

The Hon'ble G. G. Morris, *Judge.*

Issues—Evidence.

Case No. 1057 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Sylhet, dated the 12th February 1874, reversing a decision of the Moonsiff of Sonamgunge, dated the 13th November 1873.

Chunder Nath Shaha (Plaintiff) *Appellant,*

versus

Shaikh Noorah (Defendant) *Respondent.*

Baboo Joy Gobind Shome for Appellant.

Baboo Bharut Chunder Dutt for Respondent.

A plaintiff's case ought not to be prejudiced by his omission to bring proof specifically on a point which was not put in issue.

It is urged in special appeal that the Judge of the Lower Appellate Court has allowed an objection to prevail, which was never taken in the first Court; and which objection has reference to a defect in the form of the suit which does not affect the merits of the case.

The plaintiff sued for the rent of the years 1277, 1278, and 1279 in respect of one anna share in a certain property. The defendant replied that he was no tenant of the plaintiff and that the plaintiff had no right to the share claimed by him.

The first Court found that the plaintiff was entitled to the share he claimed; that he was the legal representative or successor of one Purmanund Ghose, who had received his share of the rent from the defendant, and so gave a decree in plaintiff's favor.

On appeal the Judge reversed this decision in the following words:—"It has been ruled "by the High Court that a sharer in a joint "estate cannot sue for rent of his share "unless it has been so received previously, "and the ryots have agreed to pay the rent "to such sharer separately. Again it has "been ruled that a sharer in a joint estate "cannot sue for a kabooleut for his separate "share. Plaintiff's witnesses proved that "the rent had been previously collected by "one sharer for all the shares jointly, and so "plaintiff had not a leg to stand on. I admit "this appeal, and reverse the order of the "Lower Court."

The special appellant admits that he did not make the co-sharers parties to the suit; but he urges that this is immaterial, as the first Court has found that his predecessor in title received rent separately from the defendant, while the Judge has impliedly allowed that he is the sharer in the estate to the extent claimed by him. It is clear, however, that the Judge has arrived at a finding on the evidence opposed to that of the first Court, for he says,—"Plaintiff's "witnesses proved that the rent had been "previously collected by one sharer for all "the sharers jointly." If this be a right finding, then clearly plaintiff had no right to maintain this suit. There was no agreement on the part of the defendant to pay to the plaintiff this particular rent. The contract of payment of rent was between the defendant on the one part, and the plaintiff jointly with other persons, his co-sharers, on the other part.

But the vakeel for the special appellant contends that as the issue was never raised in the Court of first instance whether the plaintiff could sue separately or not, he did not bring proof specifically on this point, and that so his case ought not to be prejudiced by this omission. In the first Court, he confined himself to giving proof that the plaintiff was a sharer in the property, and had an interest in the estate to the extent of one anna share in the land claimed by the defendant, and it was not needed of him to prove more.

Digitized by Google

Looking to the course and conduct of the proceedings in this case, I think that there is good ground for this contention. The case must go back for the determination of the issue whether or not the plaintiff can sue separately to recover rent from the defendant as a one anna sharer in the property. This issue should be tried in the Court of first instance, and for its complete determination that Court should allow plaintiff to cure the original defect in his suit by making his co-sharers in the property parties to the suit. Each party will also be allowed an opportunity of adducing evidence in support of his allegations on this issue.

The costs should abide the event.

The 26th February 1875.

Present:

The Hon'ble Romesh Chunder Mitter, *Judge.*

Eviction—Possession—Title—Witnesses to a Deed—Evidence—Act I of 1872 *s.* 13—*Decree.*

Case No. 1230 of 1874.

Special Appeal from a decision passed by the Judge of Cuttack, dated the 13*th March* 1874, *reversing a decision of the Moonsiff of Tajpore, dated the* 3*rd September* 1873.

Daitari Mohanti and another (two of the Plaintiffs) *Appellants,*

versus

Jugo Bundhoo Mohanti and others (Defendants) *Respondents.*

Baboo Romesh Chunder Bose for Appellants.

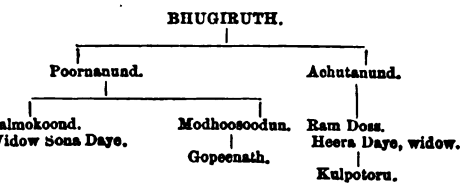
Baboo Amarendro Nath Chatterjee for Respondents.

A person unlawfully evicted is entitled, on proof of prior occupation, to be restored to possession, if the party evicting him cannot make out a superior title.

Even where the witnesses to a deed of sale are alive, their testimony is not the only evidence by which it can be established. It may be established by any other evidence.

Under the Evidence Act, s. 13, road cess papers and a deed of sale are evidence *quantum valeant.* So is a decree, although the party against whom it is treated as evidence was no party to it.

FOR the clear elucidation of the facts of this case, which are somewhat complicated, the following genealogical tree is subjoined :



The plaintiffs allege that the land in suit originally belonged to Poornanund, and after his death devolved upon his two sons, Balmokoond and Modhoosoodun. Upon the death of Balmokoond, Modhoosoodun, Sona Daye, and Gopeenath succeeded to their rights respectively, and ultimately Gopeenath dying without issue, the whole property came into the possession of Sona Daye, who, on the 8th Srabun 1252, sold it by a kobalah to two persons,—*viz.*, Duttohuri Mohanti and Gouree Mahanti, husband of plaintiff No. 3. Duttohuri Mohanti, on his death, was succeeded by his minor grandson, Huree Bundoo, and on the 4th of Assin 1261, Suchi Daye, as mother and guardian of the minor Huree Bundoo, sold his share in this property to the ancestors of plaintiffs Nos. 1 and 2.

That thus the ancestors of all the three plaintiffs, having acquired title to the whole of the land in suit, remained in possession. That defendant No. 1 having caused a kobalah to be executed by Heera Daye, widow of Ram Doss, in his favor, of a portion of the disputed land, has dispossessed them on the 15th Falgoon 1280. Hence this suit for the recovery of possession.

The defendants, on the other hand, allege that the property was originally acquired by Bhugiruth, and on his death devolved upon Poornanund and Achutanund; that both Gopeenath and Sona Daye having predeceased Kulpotoru, the grandson of Achutanund, he, Kulpotoru, thus being the last surviving male member of the family, obtained the whole property, and on his death was succeeded by his mother Heera Daye; that Heera Daye, who is defendant No. 2 in this case, has sold, out of the disputed property,

Digitized by Google

1 M. of land to defendant No. 1. They further state that the alleged sale transactions, both of 1252 and 1261, are not true.

The Moonsiff who tried this case in the original Court found: (1) that the property originally belonged to Bhugiruth; (2) that the fact of Kulpotoru surviving both Gopeenath and Sona Daye was not established; (3) that the kobalah of 1252 was neither proved nor disproved; (4) that the kobalah of 1261 was genuine; and (5) that the plaintiffs and their predecessors in title had been in possession of the disputed land for more than twelve years before ouster, and the possession of defendants Nos. 1 and 2 was not established. The Moonsiff having come to these conclusions regarding the disputed facts of the case, made a decree for possession in favor of the plaintiffs. The effect of his finding is evidently this, that though Sona Daye's title to the whole of the disputed property has not been made out, yet the plaintiffs are entitled to a decree upon the strength of their possession before ouster for more than twelve years.

The District Judge, on appeal, has reversed this decree, and his finding at least upon one of the disputed questions of fact,—*i.e.*, upon the question of possession,—is not very clear.

Before noticing the grounds of special appeal, I think it is necessary to have a precise idea of the nature of the finding of the Lower Appellate Court upon the question of possession. It must be borne in mind that the Moonsiff found that the plaintiffs' possession for more than twelve years before ouster had been established to his satisfaction.

The District Judge begins his judgment by observing: "I cannot uphold the decree of the Lower Court as it appears to me not to be in consonance with the evidence." Then adverting to certain allegations in the plaint, and being of opinion with reference to them that this suit is more in the nature of a suit for declaration of title than any thing else, he comes to the conclusion that "under such circumstances plaintiff was bound to prove both his possession and his title in the clearest manner," and he finds that the plaintiff "has not done so." The District Judge then proceeds to notice the reasons which led him to form that opinion. These reasons are: 1*st*, that the title of Sona Daye to the whole of the disputed land has not been made out; 2*ndly*, that the deed of sale alleged to have been executed by Sona Daye is not admissible in evidence; and 3*rdly*, that certain documentary evidence, *viz.*, the road cess papers adduced by the plaintiff, are not evidence against the defendants. Then comes the fourth reason, which contains the District Judge's decision on the question of possession. "In the fourth "place," he observes, "plaintiff only adduces "one witness who speaks to possession to "any purpose,—*viz.*, witness No. 8. This "witness only attests a few palm-leaf receipts "out of many, and his evidence is more than "counterbalanced by the evidence of Janokee, "one of the proprietors, by a decree for rent "against defendants' privies obtained after "the creation of plaintiff's title, by the "evidence of numerous witnesses to the "possession of Heera Bewah, who seem to "know much more about the property of "her family and plaintiff's vendors than "those adduced by plaintiff."

This passage, if it stood alone, would lead to the conclusion that the District Judge intended to find that the plaintiffs had wholly failed to prove their possession even for a single day. But in the next paragraph he concludes his judgment thus:—"Looking to "the whole evidence on record, this Court is "of opinion that not only is plaintiff's title "bad, but that he has not shown himself to "have been so long in possession as to "enable him to retain it on the strength of "his evidently bad title, as the Moonsiff "seems to think. He has in no way discharged the burden of proof which fell "upon him in a suit of so declaratory a "nature as the present one clearly is."

On the question of possession the judgment of the Moonsiff is clear and explicit, and the grounds upon which he comes to his conclusion upon this point appear to me to require best consideration and careful examination before they can be rejected or set aside. Then, under these circumstances, and specially having regard to the dubious character of the finding of the Lower Appellate Court upon this question of fact, I think that I ought to deal with this special appeal upon this footing, *viz.*, that the Appellate Court has not entirely reversed the finding of the first Court upon this matter, but has held that the plaintiffs have failed to prove previous possession for such a length of time as to dispense with the necessity of their establishing title. I must, therefore, hold that the Judge has not come to a final conclusion against the view of the Moonsiff that the plaintiff has not made out possession for any length of time before ouster, and that

Digitized by Google

the finding of the first Court upon this point still stands.

This being then the finding of the Lower Appellate Court upon the question of possession, it is quite evident that the decision of that Court, dismissing the plaintiffs' suit, rests upon the ground that Sona Daye's title to the whole of the land in suit being not established, and the plaintiffs' possession over a period of more than twelve years not being made out, this suit, which is for the declaration of their title, must necessarily fail.

It appears to me that the District Judge has taken an erroneous view of the nature of the present suit. It is not a suit for the declaration of the plaintiffs' title only; the plaintiffs distinctly seek to be restored to possession, and the decree of the first Court, the propriety of which alone was under the consideration of the Appellate Court, granted only this relief. Therefore, the ground upon which the suit has been dismissed seems to be not valid.

But even according to the Judge's view of the nature of the present suit,—are the plaintiffs entitled to a decree for possession when the title of Sona Daye to the whole of the disputed land has not been made out, and their kobalah from her not proved, or the possession on the part of the plaintiffs and their predecessors not established for a sufficient length of time? This is the question raised in the first ground of special appeal which I have next to determine.

A person unlawfully evicted is entitled on proof of prior occupation to be restored to possession, if the party evicting him cannot make out a superior title. There is a clear conflict of authorities upon this point, but the recent decisions are all in one way and entirely in support of this proposition. It is, I think, also consonant with natural justice. A party in possession of a thing, but without any other title, is certainly entitled to continue in possession as against an utter stranger, who has not got a shadow of right. If this be so, he is entitled to hold it until turned out by a person who is the real owner. His right to possession as against an utter stranger is clear. Therefore, in this case, if the defendants have no title to the land in suit, the plaintiffs are entitled to recover on the strength of their prior possession. The next point I have therefore to determine is whether the defendants have made out any such title.

There is no question that the defendant Heera Daye has succeeded to the rights of her son Kulpotoru, whatever they are. Upon the finding of the Courts below, Kulpotoru's right to a moiety of this property is undoubted, because the whole of it originally belonged to Bhugiruth, who had two sons, and one of them, Achutanund, is his grandfather. It is also an admitted fact in this case that Kulpotoru survived Gopeenath, who again had survived Balmokoond. I take this as an admitted fact, because the allegation of the plaintiffs is that they took a kobalah from Sona Daye after the death of both Balmokoond and Gopeenath, which kobalah was witnessed by Kulpotoru, and the fact of Gopeenath surviving Balmokoond is expressly admitted in the plaint. Therefore, it follows that after the death of Gopeenath, by the Hindoo law of inheritance, Kulpotoru would succeed to his rights. This being so, Kulpotoru's title to a three-fourths part of the land in suit is clear, and the plaintiffs are therefore not entitled as against Heera Daye, who is one of the defendants in this case, to recover that share of the property by the proof of bare possession. Therefore, the decree of the Lower Appellate Court, so far as three-fourths share of the land in suit is concerned, is right.

Now it remains to consider whether the plaintiffs are entitled to a decree for the remainder. It has been found that Kulpotoru's surviving Sona Daye has not been established. Consequently Heera Daye has not shown any title to this share. She could not derive it through her son Kulpotoru, who has not been shown to have survived Sona Daye, and under the Hindoo law she herself would not be entitled to succeed to it after Sona Daye's death. Therefore it follows that the defendants have failed to establish any title to this share of the property in dispute, and consequently the plaintiffs would be entitled to recover it, if they succeed in making out that they have been in possession of it before eviction. The Lower Appellate Court, as I have observed before, has not come to a final conclusion upon this question of possession, and I think therefore that the case ought to be remanded to that Court, so far as this particular share is concerned, for the determination of it.

In the next place, it has been contended before me that the Lower Appellate Court is wrong in holding that the deed of sale executed by Sona Daye "is not admissible in evidence, it is not thirty years old, and it is not proved that the attesting witnesses are dead." The reasons assigned by the Judge

Digitized by Google

for holding the deed of sale not admissible in evidence are certainly not right. He seems to be of opinion that the deed of sale is not capable of being established by any evidence other than the testimony of the witnesses to it, if they are alive. This is not correct. The deed may be established by any other evidence. But it is immaterial to enter into this discussion, because as a matter of fact no evidence has been adduced in support of its execution. Therefore the District Judge is right in treating it as a document the genuineness of which has not been established.

The next ground of special appeal which has been argued before me is that the Lower Appellate Court is in error in holding that the road cess papers are no evidence against the defendants, and that the judgment of that Court is defective in not expressing any opinion upon the genuineness of the subsequent kobalah of 1261. I think this contention is valid. Under Section 13 of the Evidence Act, both the road cess papers and the deed of 1261 are evidence, which ought to be considered. Whatever their value may be, they are evidence. They are, it appears to me, transactions and instances in which the rights of the plaintiffs and their predecessors were asserted and recognized.

There remains to consider one more point which has been raised before me, *viz.*, whether the Lower Appellate Court is right in treating a decree to which the plaintiffs were no party as evidence against them. I think, for the reasons given by me in disposing of the last objection, the Judge's decision is correct upon this question. With reference to the Section already quoted, it has been held in a recent case that such decrees are evidence.

These are all the objections in special appeal which are worth noticing, and the remaining grounds which have all been argued before me do not raise any point of law.

For these reasons I am of opinion that this special appeal must fail so far as three-fourths share of the land in suit is concerned, and with reference to the remaining share it will have to be remanded to the Lower Appellate Court for re-trial. If the ultimate decision be wholly against the plaintiffs, they will be liable for the whole of the costs of this litigation in all the Courts. But on the other hand, if they succeed partially, the costs will have to be apportioned according to the measure of their success.

The 26th February 1875.

Present:

The Hon'ble W. F. McDonell, *Judge.*

Court Fees Act VII of 1870 *s.* 12 *cl.* 1—*Appeal—Act VIII of* 1859 *s.* 36.

Lowazima Special Appeal from a decision passed by the Judge of Hooghly, dated the 27th August 1874, *affirming a decision of the Subordinate Judge of that district, dated the 17th March* 1874.

Rajkristo Banerjee and another (Plaintiffs) *Appellants,*

versus

Bama Soonduree Dassee and others (Defendants) *Respondents.*

Baboo Nil Madhub Bose for Appellants.

No one for Respondents.

The provision of finality made by the Court Fees Act, 1870, s. 12 cl. 1, attaches to the value of the suit, and not to the value of the stamp; a decision as to whether the full stamp duty should be paid being appealable under the Code of Civil Procedure, s. 36.

Note by the Deputy Registrar.—This appeal is from an order of the Lower Appellate Court rejecting an appeal on the ground that it was not presented on a proper stamp.

The Lower Court's order appears to me to be final under the terms of Clause 1 Section 12 of the Court Fees Act of 1870.

Laid before the Third Bench for orders as to the admission of the appeal or otherwise.

Judgment of the High Court.

McDonell, J.—I am of opinion that this is not a case in which, under Clause 1 Section 12 of the Court Fees Act, 1870, the Lower Court's order must be held final. Clause 1 Section 12 states:—"Every question relating "to valuation for the purpose of determining "the amount of any fee chargeable under "this Chapter on a plaint or memorandum "of appeal, shall be decided by the Court "in which such plaint or memorandum, as "the case may be, is filed, and such decision "shall be final as between the parties to "the suit." The question then arises whether the word "valuation" in that Section means the value of the suit, or whether it means the value of the stamp. If it means the value of the suit, there has been in this case no question relating to its valuation, for all throughout the value has been

Digitized by Google

admitted to be Rs. 2,000. The only question was whether it was a declaratory suit or not, and whether the full stamp duty should be paid, or Rs. 10 as for declaratory suits. Holding that the finality only attaches to the value of the suit, and not to the value of the stamp, and that under Section 36 of the Civil Procedure Code there is an appeal in this case, the appeal is admitted.

The 4th January 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Neumputro—Partition—Hindoo Law.

Case No. 291 of 1873.

Regular Appeal from a decision passed by the Judge of Hooghly, dated the 3rd June 1873.

Jeebun Kristo Gossamee (Plaintiff) *Appellant,*

versus

Romanath Gossamee and others (Defendants) *Respondents.*

Messrs. Montriou and *Lowe*, and *Baboos Gopal Lall Mitter, Hem Chunder Banerjee, Kishen Komul Bhuttacharjee*, and *Sreenath Chunder* for Appellant.

The Advocate-General and *Messrs. Evans* and *C. Jackson* and *Baboos Mohinee Mohun Roy, Bama Churn Banerjee*, and *Kumla Kant Sen* for Respondents.

Where a *neumputro*, executed by the father of a joint Hindoo family many years before his death, declared that his four sons were not to divide the property; but that any single member of the family, desiring to make any particular arrangement, would be bound by the wishes of the others, and it happened eventually that one of the sons pre-deceased his father without issue, and another leaving two sons, who were not bound by the prohibition, HELD that as these grandsons were parties having interest in the property, conditions which do not and cannot affect them ought not to be held to restrain the other co-sharers.

Quære.—Is such a provision in the deed as that which prohibits partition valid, or is it contrary to Hindoo law, *ultra vires* and null and void?

Jackson, J.—THIS is a suit by Jeebun Kristo Gossamee, son of the late Gour Mohun Gossamee, in which the plaintiff sought to have it declared that the immoveable property left by the father was subject to partition among the heirs of whom he is one. The principal facts alleged in the plaint were that Gour Mohun Gossamee had four sons, one of whom, the fourth Brojo Nath, pre-deceased his father without issue, and that the second, Pran Kristo, also pre-deceased his father, leaving two sons, Oomesh and Koonjo Beharee; that the eldest Romanath is now alive and is the principal defendant, and the plaintiff himself is the third son; that the father Gour Mohun died on the 11th Jyst 1278, whereupon the defendant Romanath, the plaintiff, and the two sons of Pran Kristo, jointly applied for a certificate under Act XXVII of 1860, upon which the widow of Gour Mohun, who is also a defendant in the present suit, objected to their application, and set up a document called a *neumputro* executed by Gour Mohun under date the 30th May 1850, which purported to make certain disposition of the property of Gour Mohun, and the District Judge thereupon refused the certificate applied for, but granted one in accordance with the *neumputro* to the defendant Romanath, who was the manager named in that document for the direction of the estate. It seems that Romanath has never yet taken out any certificate under the orders of the District Judge, and the *neumputro* itself is impugned as being contrary to the Hindoo law, and it is further alleged that the deceased Gour Mohun, who, as it appears, lived for some 21 years after the making of the document, did himself afterwards act in contravention of it, and disposed of a portion of the property as if it were not in existence or, at any rate, in force.

The District Judge, before whom the suit was tried, framed the three following issues: first, "Was the document executed "by Gour Mohun Gossain, dated 30th "May 1850, intended to have immediate "effect or only after his death?" Secondly, If it was intended to have immediate "effect, has the same become inoperative and "been rescinded by the acts of Gour Mohun "Gossain?" And thirdly, "Is the provision "in the deed declaring that the property shall "not be liable to partition among his sons, "valid or is it contrary to Hindoo law *ultra* "*vires* and null and void?"

This third issue upon the question of Hindoo law is one which has been greatly pressed to us by the learned Counsel who appeared for the appellant (Mr. Montriou) and which undoubtedly is one of considerable importance and not one altogether free from doubt, but the importance of the question renders it very desirable that we should abstain from expressing any opinion upon it, unless it is absolutely necessary that we should do so. In our opinion, the circumstances of the case

Digitized by Google

are such that it is not necessary, and we ought not, therefore, to enter upon any consideration of that question. It appears to us that the document in question is not strictly a will. It purports to make no disposition of the property of Gour Mohun otherwise than in accordance with the Hindoo rules of inheritance. It contains rather, as it appears to us, a scheme of management prescribed by the father in view of his death, which then appeared imminent, and with reference to the state of the family as it was at that time. He then had a wife, who was probably a person in the vigour of life, and for whom he seems to have had considerable attachment and respect. He had an eldest son, Romanath, who was already a man well versed in business and in the affairs of life, and his younger sons were not nearly approaching Romanath in point of knowledge and experience. If, therefore, we assume (for another view of it is also possible) that this was a *bonâ fide* instrument executed by Gour Mohun for the benefit of his family at that time, it seems to have contemplated the state of things then existing. Gour Mohun, however, recovered and lived many years after the date of it. It seems never to have been afterwards reverted to nor mentioned by the father just before his death which actually occurred some 21 years afterwards, when the situation of the family was greatly changed. We find that Gour Mohun himself acted in contravention of it when he gave certain landed property to his daughters, and it is also to be noticed that the declarations of the mother and of Gour Mohun's daughter in this suit, and the statements and the conduct of the defendant Romanath himself, and of the family on Gour Mohun's death, are all evidence to show that the writing in question was not regarded by Gour Mohun or by the family as then operative or intended to be operative. To this it may be added that the document does not, in any view of it, purport to restrain partition for ever. What it declares is that the persons contemplated the immediate heirs and successors, *viz.*, the four sons of Gour Mohun, were not to divide the property; but that any single member of the family, desiring to make any particular arrangement would be bound by the wishes of the others. For whatever reasons or purpose the *neumputro* prohibited partition *amongst the four brothers.* It happened that one died childless, and another leaving two children, who clearly were not bound by the prohibition; and as they are parties having interest in the property, it appears to us that conditions which do not and cannot affect them ought not to be held to restrain the other co-sharers. We think, therefore, that the *neumputro*, whatever its effect might have been, if it were now in force in limitation or in restraint of the rights of the heirs, cannot now be held to have any such effect, and is not in fact operative. We, therefore, reverse the judgment of the Court below, and declare that the property referred to in the suit is subject to partition at the option of the parties entitled thereto. The decree will be reversed with costs payable by Romanath.

The 4th January 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Suit for an Injunction—Damages—Landlord—Undertenants.

Case No. 49 of 1874.

Regular Appeal from a decision passed by the Second Subordinate Judge of the 24-Pergunnahs, dated the 28th January 1874.

Mr. Peter Nicholl and others (Defendants) *Appellants,*

versus

Tarinee Churn Bose (Plaintiff) *Respondent.*

The Advocate-General and *Mr. J. S. Rochfort* for Appellants.

Messrs. Kennedy and *R. T. Allan* and *Baboo Obhoy Churn Bose* for Respondent.

Cases Nos. 932 to 937 of 1874.

Special Appeals from a decision passed by the Judge of the 24-Pergunnahs, dated the 17th March 1874, *reversing a decision of the Second Subordinate Judge of that district, dated the 28th January* 1874.

Tarinee Churn Bose (Plaintiff) *Appellant,*

versus

Ramjee Pal and others (Defendants) *Respondents.*

Mr. R. T. Allan and *Baboo Obhoy Churn Bose* for Appellant.

Mr. J. S. Rochfort for Respondents.

In a suit for a perpetual injunction against the principal defendants to stop the business of brick-making

Digitized by Google

carried on by them on lands which they had taken under temporary leases from their co-defendants, who were holders of small jotes within the plaintiff's zemindary, and to recover damages for alleged injury done to the lands, where the evidence showed such a continued use of the land for twenty-five years for the purpose of brick-making, as raised a strong presumption of acquiescence on the part of the landlord, and that, so far from injuring the land, the defendants had placed it in a better condition than it had been in previously:

HELD that no case had been made out for the issue of a injunction.

Jackson, J.—IN regular appeal No. 49, the appellants complain of the judgment of Baboo Brojendro Coomar Seal, Second Subordinate Judge of the 24-Pergunnahs, delivered in a suit brought by Tarinee Churn Bose against certain persons carrying on business under the title of 'Burn & Co.,' builders of the town of Calcutta. After the commencement of the suit, by an order of the Court, Ramjee Pal, Jhoroo Hathee and several other persons, being the intermediate tenants between the plaintiff and the defendants, were brought on the record and made additional defendants in the suit. The special appeals, which were heard at the same time with the regular appeal, are appeals from the judgment of Mr. Beaufort, Judge of the 24-Pergunnahs, who had before him on regular appeal several decisions of the same Subordinate Judge in other suits brought under similar circumstances by the same plaintiff. The facts of these cases are very fully set out in the judgment of the Subordinate Judge, and therefore it is not necessary that they should be stated here at any great length. The plaintiff alleged himself to be the owner by purchase of an estate called Kanchuntollah, of which he acquired one-half share in 1275 and the remaining half share in the year 1277, being about the Christian years 1868 and 1870. The principal defendants appear to have taken from the co-defendants, who are very numerous, and who are holders of small jotes within the plaintiff's zemindaree, temporary leases of the lands in dispute in these suits, and to have taken them for the purpose of carrying on their business of brick-making. It seems that plaintiff, upon learning that Messrs. Burn & Co. were about to commence this business, caused letters to be written to them by his attorney Mr. Carruthers, in which he protested against their carrying it on; but the defendants denied the plaintiff's right to interfere in the matter, and carried on the business notwithstanding. These suits, therefore, were brought by plaintiff to obtain a perpetual injunction against the defendants forbidding them to proceed with the business in question, and also to recover damages as compensation for the injury done to the land by the alleged injurious acts of the defendants. The damages, in the one case, out of which the regular appeal arises, were calculated at Rs. 21,000, and the other suits being valued below Rs. 5,000 the appeal lay to the District Judge.

In all these suits, the Subordinate Judge considered that the plaintiff had made out a good cause of action, and he accordingly ordered that the defendants should be restrained from carrying on the brick-making business. He also assessed the damages to which he considered the plaintiff entitled. In all these suits in which the appeal lay to the District Court, the Judge reversed the decision of the Subordinate Judge, and ordered that the plaintiff's suit should be dismissed.

Against this decision the plaintiff appeals specially, and in the other case the defendants appeal to this Court from the decision of the Subordinate Judge. Various formal pleas were raised in this case to which it is not necessary to advert. The main questions to be decided are, *firstly*, whether the plaintiff is entitled to the injunction which he sought; and *secondly*, whether he is entitled to recover any, and, if any, what damages from the defendants. In arguing these cases, the learned Counsel who appeared on both sides, particularly the learned Counsel for the plaintiff, laid before us a good number of English cases from which we must say we have not been able to derive any special assistance, inasmuch as they lay down rules of law which necessarily govern cases in England, but which are not we think applicable to cases in this country. Upon the general questions raised in these suits, we are inclined to concur substantially with the District Judge. We think that no case has been made out for an injunction. The evidence shows very clearly that the brick-making business, of which the plaintiff now complains, has been carried on for at any rate more than five and twenty years; that as to the land which is used at present for that purpose there is no trace of any other mode of enjoyment, and certainly it cannot be said as suggested by the plaintiff that the land has now been diverted from its original destination. It appears also that the land-

Digitized by Google

lord very well knew of the use to which the land was being put, and that in a legal sense he acquiesced, and the acquiescence was so complete, that thereby the defendants were induced to embark their capital in the business in question. But no doubt this circumstance would not prevent the plaintiff from asking for an injunction, if it appeared that the brick-making business was now carried on upon such principles as to endanger the land on which the plaintiff's enjoyment of rent depended; for, while on one hand, the zemindar has no interest left in the land but the right to receive the rent and to sell the tenure in default to pay rent; on the other hand, he is fully at liberty to protect the land from damage or injury, and to prevent any use of it by which its permanent usefulness is impaired or endangered. But nothing of the sort has been done in the present case. On the contrary, it appears to us that the improved system introduced by the defendants is rather calculated to obviate any injury which might otherwise be caused to the land. Moreover, the fact of the defendants having spent a large sum of money, and having erected works, buildings, and machinery upon the land, is an additional guarantee against the exhaustion of the soil and its sudden abandonment; and speaking for myself, I am bound to say that I find it impossible to look at the evidence and the conduct of the plaintiff without seeing that that very circumstance, *viz.*, the taking up of this business by the defendants who are persons of substance on the land has suggested the present suits which are not brought *bonâ fide* for the purpose of protecting the land from injury, so much as for the purpose of obtaining for the plaintiff a share in the profits.

We have not had brought before us, in the course of the argument of the appeals, any decision from our own Court which is very much in point. The case from Sutherland's Reports of 1864, page 275, has not very material bearing on the present question. In that case, Trevor and Campbell, JJ., held that "a talookdar "intermediate between the ryot and the zemindar "has full power to dig tanks in his tenure "in which he holds a beneficial interest, "and that consequently that act is not "one of waste requiring a perpetual injunction." On the other hand, there is a case in II Weekly Reporter, in which two of the learned Judges of this Court held at page 157:—"No doubt any ryot who "destroys his land by making holes in it for "providing earth for bricks or allows another "to do so, renders himself liable for damages "to his landlord for the permanent damage "done to his property by that means." That language appears to have contemplated a state of things very different from the present. That seems to be a case in which, in the midst of an agricultural holding, the ryot, by excavating the land and allowing persons to take earth therefrom, brought it to such a condition that the Court thought that permanent injury was done to the land, which rendered the ryot liable to account to the landlord. That is not the present case. Another judgment referred to by the Subordinate Judge from XVII Weekly Reporter is to the effect that "no tenant taking land "without some specific agreement on the "subject is entitled to change the nature of "that land from what it was when he got "it." But in this case there is such a continued use of the land for the space of five and twenty years as raises a strong presumption of acquiescence on the part of the landlord, so that this case would not be governed by the *dicta* which the Subordinate Judge has relied upon. We are, therefore, of opinion that no case for the issue of an injunction has been made out.

On the question of damages, we are not shown that any damage has been really caused to the land. From the evidence it appears that, so far from doing any injury to the land, the defendants really placed it in a better condition than it was before. It also came out on the evidence that this brick-making business is not confined to the particular lands which form the subject of suit in these cases, but that the whole of the neighbourhood is used in like manner. This fact we may say is notorious. It is not likely that a fact was unknown to the owner of the land which was well known to everybody else. We think, therefore, that the decision of the District Judge is correct and that of the Subordinate Judge erroneous, and that consequently the regular appeal must be allowed and the special appeals dismissed with costs.

Digitized by Google

The 23rd February 1875.

Present :

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Amendment of Sale Certificate—Jurisdiction—Act VIII of 1859 *s.* 259.

Case No. 215 of 1873.

Regular Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 11th July 1873.

Rajah Rughoo Nundun Singh Bahadoor (one of the Defendants) *Appellant,*

versus

Mr. Robert Wilson (Plaintiff) *Respondent.*

Messrs. Branson and *C. Gregory* and *Baboo Chunder Madhub Ghose* for Appellant.

The Advocate-General and *Mr. Phillips* for Respondent.

A Court is not legally competent to make an *ex parte* order amending a sale certificate granted under Act VIII of 1859 s. 259.

Kemp, J.—THE facts of this case, so far as they are material to its decision, may be briefly stated thus :—The plaintiff, Mr. Robert Wilson, brings this suit, alleging that on the 29th of July 1867 Roy Nundeeput Mahatoon Bahadoor obtained a decree from the Civil Court on the basis of a mortgage-bond in which the Popree factory concern and the entire estate appertaining thereto were mortgaged against Mr. Alexander Urquhart, the then proprietor and manager of the Popree concern ; that in execution of that decree the rights and interest of Mr. Urquhart in the Popree concern, together with the entire estate appertaining to the concern, were sold by auction on the 15th February 1869, and were purchased by Roy Nundeeput Mahatoon and Mr. Lingham, a pleader of the Tirhoot Court ; that possession was given to these parties, the plaintiff's vendors, and that they by a deed of conveyance sold their rights and interest in the aforesaid concern to the plaintiff ; that the plaintiff has since his purchase been in possession of Mouzah Joyutpore, the subject-matter of the suit, as appertaining to the purchased factory; that previous to the purchase by the plaintiff, the defendants had obtained a decree for arrears of rent, not for the rent of Mouzah Joyutpore, but of another mouzah, against Mr. A. Urquhart ; they applied for execution to the Revenue Court, and caused the 8 annas 1 gunda share in Mouzah Joyutpore to be attached and sold on the 28th of July 1869, the defendants, decree-holders in the rent suit, purchasing it ; that subsequently the defendants applied to be made parties to a butwarra, which was then in progress with reference to this mouzah, and they were admitted by the revenue authorities to join in the butwarra, and that the plaintiff's purchase and rights had therefore been injured by the order for proceeding with the butwarra in the names of the defendants. He, therefore, brings the present suit.

Objections were taken as to the suit being undervalued and as to limitation, but these points have not been pressed before us. On the facts of the case the defendants contended that the original decree-holder Nundeeput Mahatoon filed an inventory, specifying certain properties which he wished to have sold as constituting the rights and interest of the judgment-debtor Mr. Urquhart ; that in that inventory which the decree-holder filed, and which it was necessary to file under Act VIII of 1859, the disputed Mouzah Joyutpore was not mentioned ; that the original certificate which was obtained by the plaintiff's vendors was subsequently amended by an *ex parte* order dated the 23rd June 1869, but that that order was illegal and beyond the authority of the Court to pass.

The decree obtained by Roy Nundeeput Mahatoon, the plaintiff's vendor, will be found at page 18 of the printed book. The claim was to recover a large sum of money upon a bond executed by Mr. Alexander Urquhart, the then proprietor of the Popree concern, on the 16th of August 1864. The decree was in favor of the plaintiff Roy Nundeeput Mahatoon against Mr. Urquhart, and the decretal order was that the Popree concern was to be sold in satisfaction of the plaintiff's decree. The certificate of sale obtained by the plaintiff's vendors is to be found at page 20 of the printed book. From the specification of the properties sold, to be found at page 21 of the book, it is clear that the Popree concern in its entirety was not advertised for sale. Certain properties alleged to belong to the Popree concern, and consisting of the mokurruree lands of Mouzah Joyutpore, the mokurruree lands in Mouzah Busunt, the right of cultivation in Mouzah Bougaon, mokurruree lands in Mouzah Bougaon and mokurruree lands in Mouzah Russoolpore and other mouzahs, were sold under the certificate granted by

Digitized by Google

the Court for the sum of Rs. 37. This certificate was amended on the 23rd of June 1869. The order of amendment will be found at page 24 of the printed book. Roy Nundeeput Mahatoon and Mr. Lingham appear on that date to have petitioned the Court to the effect that although the certificate showed clearly that the concern and all its buildings passed by the sale, still as the certificate was liable to misinterpretation, because it contains a specification which purports to be a detail of the properties composing that concern, which is in reality merely detail of whatever property in the concern Roy Nundeeput Mahatoon was able in the face of opposition to ascertain, therefore they prayed that the certificate might be rectified, and a clause added to the effect that if there be any other properties besides those specified which belong to the concern, the said properties be held to have passed under that certificate.

Now this certificate as originally granted was amended according to this petition in the absence of the defendants whose certificate had been declared to take effect from a date prior to the application made to amend the certificate obtained by the plaintiff's vendors. I say prior because it is clear from the certificate obtained by the defendants in execution of their rent-decree that it was held that their certificate was to take effect from the 8th of June 1869, while the application to amend the certificate obtained by the plaintiff's vendors was dated the 23rd of June 1869, and it was made behind the back of the defendants. In this case, therefore, it is clear that we have to decide whether Mouzah Joyutpore, the subject-matter of this suit, passed under the certificate of sale to the plaintiff's vendors or not. This being a case in which there were two purchases,—one at an auction-sale in satisfaction of a decree of the Civil Court, and the other in satisfaction of a decree for rent, it becomes necessary to ascertain clearly what passed under the plaintiff's vendor's purchase. Now it appears to me very clear from the certificate already referred to and set out at page 20 of the book, that the whole of the Popree concern, including the mouzah, subject-matter of suit, did not pass under that certificate. This appears very clear to me from the wording of the detail of the properties which passed under that certificate in which the mokurruree lands in Joyutpore, consisting of about 90 beegahs only, are stated to have passed under that certificate. It is also clear that if the whole of the Popree concern, including this disputed mouzah and other mouzahs had passed, it would have been unnecessary to define the different rights which passed under the certificate. We find that two different rights in Mouzah Bougaon passed under it, namely, the right of cultivation and the mokurruree lands, and if every thing passed under the certificate it would have been quite unnecessary to enter into this detail.

We also think that the order amending the certificate is an illegal order. It has been said in the course of the argument by the learned Advocate General who appears for the respondent that the Court is empowered to amend the certificate of sale, and the learned Advocate-General alluded to a decision to be found in Volume XIV Moore's Indian Appeals. In that case I was one of the deciding Judges, and it appears that there were two decree-holders in that case both executing decrees for rent. One proceeded to execute his decree against the widow of Gouree Pershad, and the other as against the heirs of Gouree Pershad. The question before us was whether the purchaser under a certificate of the rights and interests of the widow purchased anything more than those rights and interests. We held that as the certificate stated that only the rights and interest of the widow passed under it, he had purchased nothing else but those rights and interests. The case went before their Lordships of the Privy Council, and they held that although the certificate in terms merely mentioned the rights and interests of the widow, those rights and interests were as representing her husband's estate, and therefore under that certificate the rights and interests of the heirs also passed. But that was a decision with reference to the description of title which passed, and it does not apply to the present case, where properties are distinctly specified in the certificate. Then we have the evidence of Mr. Lingham, one of the plaintiff's vendors, which will be found in the book of appeal No. 214; and here we may mention that both these cases were tried together, and therefore we have had to refer to the evidence taken in the other case. The evidence of Mr. Lingham will be found at page 31. He deposes that "the list, "which we received at the sale, of the "villages in the estate purchased was as "full as it could be made by inquiries of "Nundeeput. We have since discovered "other villages. Great difficulties were "thrown in the way of these inquiries."

Digitized by Google

He also admits that some of the villages were exempted from sale because they were in dispute, but that this the village, subject-matter of the suit, was not one of them. He also admits that Joyutpore was not named in the suit. Therefore it is clear from the evidence of the vendor of the plaintiff that all the mouzahs appertaining to the Popree concern were not attached and brought to sale and were not included in the certificate of sale.

We, therefore, think that the judgment of the Lower Court in this case is wrong, and that the plaintiff has failed to prove that the Mouzah Joyutpore in suit passed to his vendors under the certificate of sale.

We reverse the decision of the Additional Judge of Tirhoot, dated the 11th of July 1873, and decree this appeal with all costs payable by the respondent.

Pontifex, J.—With respect to appeal No. 215, I quite agree that only the mokurruree lands of Mouzah Joyutpore passed under the sale, but I wish to add that I express no opinion as to whether the other lands were or were not included in the mortgage. It is unnecessary to do so in this case, and indeed it would be impossible to express any opinion upon this point in the present case, inasmuch as the mortgagee is not before the Court.

The 25th February 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Putneedar and Tenant—Suit to set aside Putnee.

Case No. 1686 of 1874.

Special Appeal from a decision passed by the Officiating Subordinate Judge of Nuddea, dated the 25th April 1874, *modifying a decision of the Sudder Moonsiff of that district, dated the 23rd September* 1872.

Rakhal Monee Dossee and others (Defendants) *Appellants,*

versus

Brojendro Gopal Roy and another (Plaintiffs) *Respondents.*

Baboo Kalee Mohun Doss for Appellants.

Baboo Oopendro Chunder Bose for Respondents.

Where a landlord (putneedar) and his tenant were defendants in a suit by the zemindar for setting aside the putnee, and both were, by the decree, made liable for the mesne profits which the tenant eventually paid out of his own pocket: HELD, that the effect was to cancel all relation of landlord and tenant between them, and to give the tenant a right to receive back what he had paid.

Jackson, J.—ON the question of limitation, the Subordinate Judge considered that this was a case in which no specific provision was made in Act XIV of 1859; consequently that six years was the period of limitation, and that this suit having been brought within six years from the date of the payment of the wassilat was in time. Clearly the plaintiff had no cause of action in respect of this claim before the payment of the mesne profits by him, and consequently we see no reason to question the correctness of the Lower Court's decision on this part of the case.

Then it is contended that the plaintiff was not entitled to recover from the defendant, his superior landlord, the rent received by the latter in that capacity without first accounting for all the mesne profits. It seems that the plaintiff and the defendant were defendants in a suit brought by the zemindar for setting aside the putnee, and both were made liable for the mesne profits. The plaintiff's ancestor paid out of his own pocket the mesne profits for which they were all liable. The effect of that was undoubtedly to cancel all relation of landlord and tenant between plaintiff and the defendant and to give plaintiff the right to receive back what he had paid, and the circumstance that the decree-holder had shown some indulgence to the plaintiff appears to make no difference. That is a matter with which the defendant had no concern, and it seems to us that in ascertaining the amount payable by the defendant, the Subordinate Judge has gone farther in his favor than he ought to have done, because, instead of giving plaintiff the whole of the rent due, he has allowed a deduction.

The special appeal is dismissed with costs.

Digitized by Google

The 1st March 1875.

Present :

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Phulkur Rents—Jurisdiction.

Reference to the High Court by the Judge of the Small Cause Court at Bhaugulpore, dated the 27th January 1875.

Gobind Sookool, *Plaintiff,*

versus

Gokool Bhukut and another, *Defendants.*

A suit for arrears of rent of the description known as *phulkur*, being of a nature cognizable by a Revenue Officer when Act X of 1859 was in force, can now be brought before a Moonsiff. A Small Cause Court has no jurisdiction to try it.

Case.—THE question for decision in this case is whether a suit for arrears of rent of the description ordinarily known as *phulkur* can be brought in a Small Cause Court. In my opinion Clause 4, Section 6 of Act XI of 1865 deprives the Small Cause Court of jurisdiction in such cases, the suit being one which might have been brought before a Revenue officer under Act X of 1859, and now under Act VIII (B. C.) of 1869 before the Moonsiff. The case noted in the margin has been quoted on the other side, but it is not in my opinion applicable. The suit is for the rent of mangoe trees according to a dauabundi settlement, and such suits were always, I believe, held to come within the terms of Clause 4 of Act X "forest rights, fisheries and the like." It is true that *phulkur* is not expressly mentioned there, but *bunkur*, *julkur* and *phulkur* are usually mentioned together in leases, and other documents relating to land. The substitution of the present rent-law for Act X does not seem to have any bearing on the question of jurisdiction in the present case. It merely abolished the peculiar judicial powers which the former Act conferred upon Revenue Officers, and handed over the cases formerly triable by them to the ordinary Civil Courts. The jurisdiction of the Small Cause Court was not in any way enlarged, so that, if the present case would lie in a Revenue Court under Act X. it would seem that it will now lie before the Moonsiff.

Debnath Ghose v. Pachoo Mullah, VI Weekly Reporter, Civil Court References, page 8.

The judgment of the High Court was delivered as follows by

Glover, J.—In our opinion, the Judge of the Small Cause Court was right in thinking that as a suit of this nature could originally have been brought under Act X of 1859 before a Revenue Officer, it can now be brought before the Moonsiff under Act VIII (B. C.) of 1869. The Small Couse Court had no jurisdiction to try this case.

The 1st March 1875.

Present :

The Hon'ble G. G. Morris, *Judge.*

Jurisdiction—Special Appeal—Act VIII (B.C.) of 1869 *ss.* 35 *and* 104—*Act XXIII of* 1861 *s.* 27.

Case No. 1090 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Rungpore, dated the 11*th March* 1874, *affirming a decision of the Moonsiff of Bhotmaree, dated the* 13*th December* 1872.

Shoylendro Geer Sunnyasee (Defendant) *Appellant,*

versus

Patoo Doss Busanea (Plaintiff) and others (Defendants) *Respondents.*

Baboo Nullit Chunder Sen for Appellant.

Baboo Girija Sunkur Mojoomdar for Respondents.

A suit for damages for withholding a receipt for rent is not cognizable by a Court of Small Causes, and therefore does not come under the purview of Act XXIII of 1861 s. 27.

THE suit in respect of which this appeal is preferred was a suit for damages for withholding a receipt for rent.

Digitized by Google

A preliminary objection is taken that this was a suit of the nature cognizable by a Court of Small Causes, and that therefore under Section 27 Act XXIII of 1861 a special appeal does not lie.

I am of opinion, however, on a consideration of Sections 35 and 104 of Act VIII (B. C.) of 1869, that this objection is of no force. A Division Bench of this Court, in the case of Brojo Nath Dey *v.* Shumbhoo Chunder Chatterjee, in XVIII Weekly Reporter, page 25, adopts this view.

The special appellant contends that in a suit of this nature the plaintiff ought to have proved, and the Lower Appellate Court ought distinctly to have found, that the plaintiff was an under-tenant to whom a receipt ought to have been given.

The defendant challenged the fact of the plaintiff being an under-tenant of the land. He said that one Pukooa, who also appeared as an intervenor and was made a defendant in this suit, was the real tenant.

The Subordinate Judge has not clearly decided this point. At first he seems to say that the plaintiff was the tenant of the defendant, but afterwards he raises a doubt on the point. His words are as follows :—"It hence becomes clear that the plaintiff "was the person who paid rents. The oral "evidence adduced by him in this suit "shows that he paid 12 rupees on account "of the rent and was in possession of the "land in 1278."

Had he stopped here, there would have been good reason to believe that he considered that the plaintiff was the tenant, more especially as he agreed with the first Court, which arrived at a distinct finding on the point. But he goes on to say : "In the "course of arguments, I was led to believe "that the receipt for the sum paid by the "plaintiff has been given to the third party. "It seemed very probable. But before the "title of the third party as the real tenant is "established, the plaintiff must be considered "to have held the land in the name of his "son."

It thus appears clearly that he does not decide the issue as to whether the 3rd party, that is to say, the intervenor defendant, was the real tenant or not. He should have decided whether the intervenor defendant was the tenant or the plaintiff was the tenant. And as he has not come to a distinct finding on this head, the case must be remanded for a determination of that issue.

The costs will abide the event.

[PRIVY COUNCIL JUDGMENT.]

The 2nd March 1875.

Present :

Sir James W. Colvile, Sir Montague Smith, and Sir Robert P. Collier.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Ram Tuhul Sing

versus

Biseswar Lall Sahoo and another.

An estate was sold for arrears of revenue, under Act XL of 1859, and after the necessary deductions, the surplus proceeds remained in deposit with the Collector. Of these upwards of 35,000 rupees was the share of appellant, one of the shareholders, who instituted a suit to set aside the revenue sale, and after some litigation proved successful. An appeal from the decree having been dismissed by the Privy Council on 18th December 1873, the sale was conclusively set aside.

Meantime, one S. P. S., a judgment-creditor, attached the appellant's interest in the surplus proceeds, and sold it in execution for 8,000 rupees to one J. P., agent for respondents. The 8,000 rupees was drawn out from the Court, and applied in satisfaction of decrees held by S. P. S. and others. Subsequently, respondents applied to the Collector for payment to them, as purchasers under the execution sale, of the appellant's assumed interest in the surplus proceeds of the revenue sale. But as the revenue sale had been set aside, the Collector refused the application. Upon which the respondents sued the appellant, the heir of S. P. S., and the other judgment-creditors, for the 8,000 rupees with interest. The High Court on appeal gave them a decree against the appellant.

HELD, that respondents had established no title to recover the sum sued for from appellant.

HELD, that the doctrine of Courts of equity that a plaintiff who comes to be relieved from his own act must submit to the equitable conditions which the Court may see fit to impose, was inapplicable to the case of the appellant, who was not seeking the aid of the Court, but was himself sued for money paid under no contract or consent of his, but under proceedings taken *in invitum*.

HELD, that respondents bought the appellant's interest in the surplus proceeds subject to the contingency of his succeeding in his suit to set aside the revenue sale, in which event that interest would be *nil*. There is no general equity existing between the parties upon which appellant ought to be compelled to restore to the respondents their original position, because the event on which they speculated has gone against them.

THE point raised by this appeal is one of novelty, and of some nicety. The facts out of which it arises are undisputed.

The appellant is one of the registered shareholders of a certain estate which on the 16th of February 1867, was sold for arrears of Government revenue, under the last Sale Law, Act XL of 1859. The sale was confirmed by the Revenue Commissioners on the 14th of the following June ; and,

* From the judgment of Couch, *C.J.*, and Phear and Ainslie, JJ., dated 21st March 1873, 19 W. R., 351.

Digitized by Google

after deducting the arrears of Government revenue and sale expenses, the sum of Rs. 1,39,692 : 2 : 5 remained as surplus proceeds in deposit in the hands of the Collector. The share of the appellant in such surplus proceeds, if the sale had stood, would have been upwards of Rs. 35,500. On the 24th of February 1868, however, the appellant, suing *in formâ pauperis*, instituted a suit for the purpose of setting aside the revenue sale, on the ground of the non-observance of one of the formalities prescribed by the Act. The suit was dismissed by the Subordinate Judge; but, on appeal, the High Court, by an order dated the 3rd of May 1870, reversed his judgment and remanded the cause for the trial of an issue which he had left untried; and on its coming back to them with the finding on that issue, made a final decree in the appellant's favour, on the 31st of January 1871. Against that decree there was an appeal to Her Majesty in Council, which was dismissed, in conformity with the judgment delivered at this Board on the 18th of December 1873. The sale, therefore, has been conclusively set aside; the estate restored to the appellant and his co-sharers; and the purchase-money returned to the purchaser.

Before this, however, and on the 25th of November 1867, one Sheo Pershad Sookul, a judgment-creditor of the appellant, attached his interest in these surplus proceeds in the Collector's hands, and, on the 23rd of December 1867, obtained an order for the sale of that interest in execution. The sale was originally fixed for the 3rd of February following, but, on the appellant's application, was postponed for a fortnight, and took place on the 18th of February 1868, when the appellant's interest in the surplus proceeds was knocked down for 8,000 rupees to one Juldhari Panday, who afterwards declared that he bought, as agent for, and on account of, the respondents. On the 16th of March 1868, the appellant filed a petition for the reversal of this sale on two grounds; 1st, that the surplus proceeds had not been ascertained to belong to the petitioner, inasmuch as he had instituted a suit to set aside the revenue sale, which was then pending; and secondly, that the sale had been held in contravention of the 242nd section of the Code of Procedure, which prescribes a different mode of enforcing an execution against money in the hands of a third party, and, consequently, that the sale was irregular. The Principal Sudder Ameen, in whose Court these execution proceedings were pending, by two orders, dated the 18th of April 1868, disallowed these objections, and confirmed the sale; the formal certificate was, however, not delivered to the respondents until the 28th of August 1868. Of the 8,000 rupees which had been paid into Court upon the sale, about 5,318 rupees were drawn out by Sheo Pershad Sookul, and applied in satisfaction of the decrees held by him; and the residue was drawn out by other judgment-creditors of the appellant, and similarly applied by them.

On the 14th of August 1871, the respondents petitioned the Collector for payment to them as purchasers under the execution sale of the whole of the appellant's assumed share in the surplus proceeds of the revenue sale, being upwards of 35,500 rupees. The High Court had then made its final decree setting aside the sale; and the Collector therefore refused to part with the fund. Upon that, and on the 4th of August 1872, the respondents instituted the present suit for the recovery of Rs. 11,714 : 10 : 8, being the 8,000 rupees with interest, calculated from the date of the payment into Court. It was brought against the appellant, against the heir of Sheo Pershad Sookul, and against the other judgment-creditors of the appellant who had shared in the 8,000 rupees; and the cause of action is thus stated in the plaint: "As the rights of the judgment-debtor, with respect to the surplus sale proceeds of the said mehal, did exist up to the time of the execution sale held in the case of Sheo Pershad Sookul, and as by reason of the revenue sale having already been confirmed, there was no reasonable ground of apprehension with respect to such surplus proceeds; and as the Collector now objects to make over the surplus proceeds on the ground of the revenue sale being set aside; for these reasons, and, moreover, in consideration of the fact that the debts due by the judgment-debtor have been satisfied out of the consideration money paid by your petitioners, and that the judgment-debtor cannot be permitted to derive two-fold advantages, since he has been benefited by the reversal of the sale of the land, and he has not deposited in Court the amount of the purchase-money paid by your petitioners, the plaintiffs are, under such circumstances, entitled by all means to recover the said purchase-money, with interest. The cause of action has accrued from the 25th of August 1871" (the date of the Collector's refusal to pay).

Digitized by Google

It does not appear very clearly with what object the respondents sued the execution-creditors, whether or not in order to establish an alternative case for relief against them, in case the suit should fail against the appellant. The issues settled however seem to imply that the claim was for recovery of the money against one or other of the defendants.

The Court of first instance dismissed the suit with costs against all the defendants, holding that the plaintiffs had established no title to a refund of the purchase-money paid. But the High Court on appeal reversed this decision, and made a decree for the recovery of the amount claimed from the appellant; dismissing the suit as against the other defendants, but without costs as regarded the representative of Sheo Pershad Singh.

The appeal is against the last decree, and the single question is, whether the plaintiffs (the respondents) have shown that they have any cause of action for the recovery of this money against the appellant.

The appeal has, to their Lordships' great regret, been heard *ex parte*. This circumstance has rendered them the more anxious to give full weight to every reason assigned by the learned judges of the High Court in support of their decree, and to every consideration that can be suggested in favor of the absent respondents. But they have, nevertheless, come to the conclusion that the respondents have established no title to recover the sum sued for from the appellant, and that the appeal ought to be allowed.

The learned Chief Justice of Bengal, in the judgment delivered by him, with the concurrence of the two other Judges who sat with him, says :—"I think the rule that ought to be applied in this case, is that which is applied by Courts of equity where sales are set aside on account of fraud, or for other reasons which are held by the Court to vitiate the sale." And he then cites and relies upon a passage in Lord Cottenham's judgment in Bellamy *v.* Sabine, 2 Phill., which he treats as establishing the broad proposition—that where a transaction ought never to have taken place, the rights of the parties are, as far as possible, to be placed in the situation in which they would have stood if there had never been any such transaction. This observation of Lord Cottenham's was, however, made with reference to a particular objection taken to the granting equitable relief in that somewhat complicated case. The bill in Bellamy *v.* Sabine impeached two transactions: one, by which a needy father, tenant for life, and a needy son, tenant in tail, had, at the instigation of Sabine, a creditor of the father, come to a certain arrangement which involved the barring of the entail; the other, a transaction by which the son had sold and conveyed his remainder in fee, thus acquired, to Sabine. The son died in his father's lifetime, and the suit was brought by another son, who was next in remainder under the entail. Lord Cottenham held that the plaintiff was entitled to sue either in that character, or as heir-at-law of his brother; that the transaction between the father and the elder brother could not be successfully impeached; but that the purchase from the latter by Sabine was fraudulent, and ought to be set aside. And then proceeding to deal with the objection which had been taken, that the personal representative of the elder brother had an interest in supporting that purchase, part of the purchase-money being still unpaid, and that it was contrary to the course of the Court to deal with the conflicting rights of the real and personal representatives, he made the observation relied upon. In fact, he ruled only that an interest derived under the conveyance impeached could not affect the equitable right of the heir-at-law to have that conveyance set aside for fraud. If this principle has any application to the present case, it seems to be against rather than in favour of the respondents. The conveyance was set aside on the terms ordinarily imposed, viz., the repayment by the plaintiff to Sabine of the sums actually paid by him.

In their Lordship's opinion, however, the case of Bellamy *v.* Sabine, and the other cases in equity which are cited in the judgment under appeal, are inapplicable to the present, upon the broad ground that they all proceed upon the doctrine of Courts of Equity—that a plaintiff who comes to be relieved from his own act, or the act of one whom he represents, on equitable grounds, must do equity, and submit to those equitable conditions which the Court may see fit to impose on its grant of relief. Here the appellant is not seeking the aid of the Court, but is sued as a defendant, and the money sought to be recovered has not been paid under any contract of his, or in any transaction to which he was a consenting party, but under proceedings taken *in invitum*.

Again their Lordships must observe that a fallacy, occasioned by some confusion in the use of the words "transaction" and "sale," seems to run through the judgment. What is the transaction or sale which has

Digitized by Google

been set aside? It is not the execution sale under which the 8,000 rupees were paid, but the statutory revenue sale. A good deal, no doubt, has been said in the judgment of the Court of First Instance, and something has been said here at the bar, of the irregularity of the execution sale, and of the miscarriage of the Principal Sudder Ameen in putting up the appellant's possible interest in the surplus proceeds for sale, instead of proceeding under the 242nd section of the Code of Procedure. And their Lordships think it is much to be regretted that that officer did not proceed under the wholesome provision which was designed in such cases to remedy a mischief of frequent occurrence in India—the ruinous sacrifice of property which an execution sale is apt to involve. But they must observe that since the objections of the appellant were overruled, no attempt has been made to question the regularity or legal effect of that sale; that the respondents held to it as long as there was a hope of their getting anything by it; that their present suit is not framed with the object of setting it aside, or of being relieved from it; and consequently that any judgment declaring its invalidity, or treating it as a nullity, would be extra-judicial.

The learned Chief Justice no doubt seeks to meet the objection just taken by saying that the appellant ought to have made the respondents parties to the suit for setting aside the revenue sale, and holds that the Court ought to give them in this suit the relief which he assumes they would, if they had been made parties to it, have obtained in the other suit, by way of condition on the relief then granted. Their Lordships, however, fail to see that there was any obligation, on the appellant to make the respondents parties to that suit, and have some doubt whether this question could have been litigated in a suit, the only object of which was to determine whether a statutory sale was to stand good, or was to be set aside upon the terms prescribed by the Statute. And in any case it would seem that the respondents, if they conceived that they had an interest entitling them to defend that suit, of which they had full notice, might have applied to be made parties to it under the 73rd section of the Code of Procedure.

Upon the whole, then, their Lordships are of opinion that the course and practice of the Court of Chancery in setting aside transactions on account of fraud, or other recognized ground for equitable relief afford no support to the decree under appeal.

Upon what ground, then, can the respondents be said to have a substantive cause of action for the recovery of this money from the appellant?

What was the real nature of their purchase at the execution sale? What did they buy? They bought the appellant's interest in the surplus proceeds, subject to the contingency of his succeeding in his suit to set aside the revenue sale, in which event that interest would become *nil*. They did this with their eyes open, since, at least before the sale was confirmed, they had notice that his suit had been commenced. There was no warranty or contract on his part. The sale was had under proceedings in *invitum*, and indeed against his express protest. The parties were at arm's length. The appellant was free to prosecute his suit; the respondents free to enforce their rights, should he fail, to the uttermost farthing. What they bought, then, was the chance of getting Rs. 35,500 for Rs. 8,000, dependent on the happening or non-happening of a certain event. And a substantial chance it must be taken to have been, since the construction of the clause in the Sale Law, on which the right to annul the sale depended, was doubtful, and the Court of First Instance determined the question against the appellant. If that judgment had stood, he would have lost his land; and the respondents would have taken from him all its proceeds, except the Rs. 8,000 applied in satisfaction of his debts. It is difficult to see upon what general equity existing between parties thus situated the appellant ought to be compelled to restore the respondents to their original position, because the event on which they speculated has ultimately gone against them.

Then it is said that if the respondents fail in the present suit, the appellant will not only keep the estate which he has recovered, but will get debts to the amount of Rs. 8,000, for which his property was liable to be attached and sold, paid with the plaintiffs' money.

But even if this were true, it is not in every case in which a man has benefited by the money of another, that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation, express or implied, to repay. It is well settled that

Digitized by Google

there is no such obligation in the case of a voluntary payment by A of B's debt. Still less will the action lie when the money has been paid, as here, against the will of the party for whose use it is supposed to have been paid (Stokes *v.* Lewis, 1 Term Reports, 20). Nor can the case of A be better because he made the payment not *ex mero motu*, but in the course of a transaction which, in one event would have turned out highly profitable to himself and extremely detrimental to the person whose debts the money went to pay.

Their Lordships can find no ground on which the legal liability of the appellant can satisfactorily be rested. The case seems to them to fall within the principle of that reported in the 4 Bengal Law Reports, Full Bench Ruling, page 11.* The fact that in this case the worthlessness of the subject purchased was a consequence of the success of the judgment-debtor in his own suit, and not of a recovery by a third party under a superior title, does not appear to them in the circumstances of this case to afford a distinction which ought to prevent the application of that principle.

Their Lordships, for obvious reasons, express no opinion whether the respondents could have had any remedy against the execution creditors by a suit for setting aside the execution sale or otherwise; whether in such a case the right of the judgment-creditors would not have been revived against the appellant; or whether, if such a remedy ever existed, the plaintiffs have lost it by the dismissal of this suit against those creditors. These and other questions were suggested in the course of the argument, but in determining this appeal it is unnecessary, and, indeed, would be improper to decide them.

Their Lordships will humbly advise Her Majesty to allow this appeal, and to direct that the decree of the High Court be varied by omitting so much thereof as orders and decrees "that the plaintiffs do recover from the first defendant the sum of Rs. 11,714 : 10 : 8. the principal and interest of money which they had paid upon a sale to them of the rights and interests of Ram Tuhul Singh in the surplus sale proceeds of a Talook Muleck Alypore Buzoorg, which had been sold for arrears of Government revenue, and purchased by the plaintiffs on the 18th of February 1868;" and as orders and decrees "that Ram Tuhul Sing, defendant, respondent, do pay to the plaintiffs, appellants, this sum of Rs. 470 : 10 : 2;" and as orders and decrees "that the said first defendant do pay to the plaintiffs the costs incurred by them in the Lower Court;" and by ordering and decreeing in lieu thereof that the suit of the plaintiffs do stand dismissed as against the defendant, Ram Tuhul Singh, and that the plaintiffs do pay the costs incurred by the said defendant both in the Lower and in the High Court.

Their Lordships are disposed to recommend an order in the above form, because they do not wish to interfere with the discretion exercised by the High Court in refusing to give his costs of the suit to the defendant Byjnath Sookul. The appellant must also have the costs of this appeal.

* Sowdamini Chowdrain and others *v.* Krisna Kishore Podar, XI W. R. (F. B. R.), p. 8.

The 3rd March 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Interest—Contract.

Case No. 27 of 1874.

Regular Appeal from a decision passed by the Deputy Commissioner of Hazareebaugh, dated the 20th November 1873.

Bhugwan Doss and others (Plaintiffs) *Appellants,*

versus

Tekait Than Narain Deo (Defendant) *Respondent.*

Mr. R. T. Allan and *Baboo Hureehur Nath* for Appellants.

No one for Respondent.

Where a Civil Court awards interest under an admitted contract, it is bound to award it at the stipulated rate up to the date of decree; but for any time after that date it has power to exercise its own discretion as to the rate of interest to be awarded.

Glover, J.—THE only question in this appeal is the question of interest. The Deputy Commissioner has decreed the plaintiff's claim on the admission of the defendant, and has on that admission allowed interest at the rate of 36 per cent. per annum up to the date of the decree, but after that date he has cut down the interest to six per cent. Mr. Allan for the appellant objects strongly to this lower rate of

Digitized by Google

interest being allowed by the Lower Court, and claims to have it at the rate of 36 per cent, as agreed to in the contract made between the parties, up to the date of payment. It appears to us that the Lower Court had power to exercise its own discretion in making an order in respect of interest from any time after the date of the decree. Up to that date, no doubt, the Court was bound on the admission of the defendant to give interest at the rate of 36 per cent. The Deputy Commissioner has stated certain circumstances upon which he considers that this is not a case in which the full rate of interest agreed to between the parties should be allowed for any time after the date of the decree. Those circumstances were peculiarly within his own knowledge, and we cannot say that they do not justify him in coming to the conclusion that he did. The case of Rashessur Surmah *v.* Kalika Nath Surmah and another reported in the XI Weekly Reporter, page 455, is in point. The appeal must be dismissed but without costs, no one appearing for the respondent.

Mitter, J.—I concur in dismissing this appeal.

The 3rd March 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Rule to show Cause under Act VIII of 1859 *s.* 15—*Non-compliance—High Court's Act s.* 15.

In the matter of

Samuel Cochrane, Manager of the Agra Bank, Limited, *Petitioner,*

versus

Maharanee Brojo Soonduree Debia, *Opposite Party.*

The Advocate General and *Mr. J. T. Woodroffe* for Petitioner.

Mr. Kennedy and *Baboo Mohesh Chunder Chowdhry* for Opposite Party.

Where on the application of the decreeholder, notices were issued by the Court under Act VIII of 1859 s. 216, on the representative of the judgment-debtor, to show cause why the decree should not be executed against him, and the said representative abstained from doing so under advice, HELD that the acts of the Court could not be regarded as nullities such as absolved him from taking notice of them and entitled him to apply to set aside the execution-sale which followed.

Before relief is afforded under the High Court's Act, s. 15, it must be made clear that the party seeking it did not contribute by his own conduct to being placed in the position in which he finds himself.

Jackson, J.—THIS rule was obtained by Mr. Cochrane, Manager of the Agra Bank, with a view to set aside a sale in execution of decree, which decree was obtained in a suit by the husband of Maharanee Brijo Soonduree Debia against Messrs. Gilmore, McKilligin and Co., who were owners of a certain Indigo Factory and against their manager. It appears that at the time when the decree was obtained, Gilmore and McKilligin were both dead. The suit appears to have been defended, but the plaintiff obtained a decree for recovery of the land which was the subject of dispute and for wassilat. The Ranee's husband having afterwards died, the Ranee was in the first instance put into possession of the land. She then desired to execute in respect of the wassilat, and having then probably become aware of the death of the defendants, and considering Mr. Cochrane to be liable by reason of the Agra Bank having purchased the equity of redemption, and having undertaken the *dena powna* connected with the factory, the Ranee applied to the Court, under Section 210 of the Civil Procedure Code, to execute the decree against Mr. Cochrane as manager of the Bank. It is not very clear what was before the Court on the first occasion when the application was so made, but a notice was subsequently issued under Section 216, informing Mr. Cochrane that execution was sought for against him as heir and representative of the defendant McKilligin, and calling upon him in terms of that Section to show cause why the decree should not be executed against him. Mr. Cochrane says that he was advised that such application was groundless, and under the advice which he received he did not show cause. On that occasion, therefore, in his absence, the wassilat were enquired into and assessed, and nothing further was done. Later on the decree-holder applied again to execute the decree, also against Mr. Cochrane, by levying the amount so assessed. Notice again issued, again Mr. Cochrane did not appear,

Digitized by Google

whether in consequence of the notice not having reached him or in consequence of advice received by him is not certain. At any rate, the putnee talook Matua belonging to the Bank was attached, and afterwards sold without objection. After the sale and after confirmation of the sale on the 1st July last, Mr. Cocharne appeared in the Court where execution had taken place, and prayed to have the sale set aside. The Subordinate Judge for reasons stated in his judgment, dated the 19th September last, refused to set aside the sale, and thereupon Mr. Cochrane applied to this Court and obtained the rule already mentioned in the month of November last.

It is a rule which, we have already observed, in affording relief to parties applying to this Court under Section 15 of the High Court's Act, that it must be made quite clear that the party applying for it has not contributed by his own conduct to his being placed in the position he finds himself in. Now it is quite clear that Mr. Cochrane had the fullest opportunity, on two occasions, of appearing before the Court and showing cause against the acts he complained of. He abstained from doing so under advice. The learned Advocate-General contends that he was perfectly justified in so abstaining inasmuch as the acts of the Court were absolutely null. It appears to us that acts of the nature complained of when done after notice to the party affected by them, cannot be regarded as nullities, so as to enable the petitioner to take the position that he was absolved from the necessity of taking notice, and entitle him to apply to this Court for setting aside the sale, and the clearer the ground on which the acts complained of are said to be bad and erroneous, the easier his course was to come before the Court and induce it to stay its hands. It may be that notwithstanding what we have said, we should have been inclined to allow the petitioner before us the relief he seeks in the present form, if we saw reason to think that a suit for setting aside the sale would not be successful, but it appears from the papers that the party who purchased at the sale is the decree-holder, the party who set the Court in motion. There can be no doubt, we think, that the decreeholder himself having been the purchaser cannot, if the petitioner's allegations be true, successfully contend that a suit to set aside the sale would not lie. Under the circumstances, we think that the petitioner is not entitled to have the relief asked for and that this rule should be discharged with costs, Rs. 100.

The 3rd March 1875.

Present :

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Evidence Act (I of 1872) s. 13—Documents.

Case No. 1411 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Midnapore, dated the 23rd March 1874, affirming a decision of the Additional Moonsiff of Kantai, dated the 11th February 1873.

Soorjo Narain Panda (one of the Defendants) *Appellant,*

versus

Bissambhur Singh (Plaintiff) *Respondent.*

Mr. C. Jackson and *Baboo Kumla Kant Sen* for Appellant.

Baboo Hem Chunder Banerjee for Respondent.

The right mentioned in the Evidence Act, s. 13, is not a public right only.

Glover, J.—This was a suit to have a declaration of the plaintiff's title in 50 beegahs 5½ cottahs of land situate in Mouzah Konjonah, and to eject the defendants therefrom.

The plaintiff's case is that he bought the land in question from one Damoo Panda in 1255, and let it out to tenants. In 1270, he leased it under a kabooleut to the defendants, and afterwards sued them on that kabooleut for rent. Plaintiff lost that suit, because he failed to prove the execution of the kabooleut, whilst the defendants established their allegation that the lands belonged to the mâl estate of a third party, the defendant No. 3 of this suit.

The defendants deny the plaintiff's title to the lands, and allege moreover that neither he nor his vendor were ever in possession of any part of them.

Both Courts below found for the plaintiff, holding that he had proved possession within 12 years and also title from Damoo Panda.

Mr. Jackson, for the special appellant, contends that this decision of the Subordinate Judge has been come to on certain documents which were not receivable as evidence, and that the oral evidence had no weight in determining the Subordinate Judge's decision. He contends that it is virtually a judgment passed upon no evidence.

Digitized by Google

It may at once be conceded that the Subordinate Judge's decision is not well expressed, or for the matter of that very intelligible. The Subordinate Judge is not well acquainted with English and writes unidiomatically, but we have no doubt ourselves as to his meaning, and it must not be forgotten that he upholds in its entirety the judgment of the Moonsiff. He only mentions one witness as proving collection of rent within 12 years, and this is relied on as showing that he disbelieved the other four witnesses to the payment of rent whose depositions are on the record, these being the witnesses who had previously deposed to the execution of the kabooleut. But the Moonsiff who believes the evidence of collection of rent mentions the fact of these few witnesses having given what the revenue Court thought to be false testimony in the matter of the kabooleut, and notwithstanding that, gives them credit for speaking truth in the matter of the rent collections, and the Subordinate Judge confirms his order. It cannot be said, therefore, that the Subordinate Judge disbelieved the oral evidence. As he said nothing against it, he must, we presume, be taken to have accepted it to the same extent as the Moonsiff accepted it.

Then as to the documentary evidence, Section 13 of the Evidence Act makes relevant facts of any transaction whereby a right is (amongst other things) claimed and recognized. Mr. Jackson contends that the right mentioned in the Section is a public right only, but the illustration shows that this is not so, the right there mentioned being a private one, namely, A's right to a fishery.

The documents filed by the plaintiff show that Government recognized the right of the plaintiff and of his predecessors in the land which is now claimed, and there is sufficient in them, combined with the oral testimony, to afford (if believed) evidence of the identity of the land with those now claimed, and to dispose of the defendant's plea that the land is and was mâl land.

We cannot, we think, say that these documents were not legally sufficient evidence on which the Courts below could have come to the findings recorded by them regarding title, whilst as regards possession within 12 years there is undoubtedly sufficient legal testimony in the evidence of the witnesses.

We do not think that we can interfere in this case, and the special appeal is dismissed with costs.

The 5th March 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Ejectment—Notice to quit.

Case No. 83 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Purneah dated the 5th December 1873, *reversing a decision of the Additional Sudder Moonsiff of that district, dated the* 19th *September* 1873.

Shaikh Golam Mehdee and others (Defendants) *Appellants,*

versus

Amjad Ali and another (Plaintiffs) *Respondents.*

Mr. C. Gregory and *Moonshee Abdool Baree* for Appellants.

Moonshee Mahomed Yusoof for Respondents.

A putneedar, desirous of ejecting a tenant whose lease has expired, need not give him a written notice to quit; a verbal notice being sufficient.

Glover, J.—THE plaintiff, a putneedar, sues to eject the defendants, Gholam Mehdee and Golam Nukkee, from 29 beegahs of land held by them on a temporary lease from 1270 to 1274. Their lease has expired, and they refuse to enter into any arrangements with their landlord for the rent of future years. Hence the suit.

The defendant Gholam Mehdee (the other brother is dead and is represented in this case by the minor) alleges that he has a right of occupancy in the disputed lands by purchase from old tenants and cannot be ejected. He points to the fact that the plaintiff brought a suit for enhancement of rent against him as evidence that the putneedar knew him to have a right of occupancy in the land.

To this it is replied that the plaintiff was a new putneedar, and was not aware of the temporary nature of the defendant's lease when he brought the suit for enhancement.

The Moonsiff fixed and tried one issue only, *viz.*, whether the defendant had a right of occupancy, and on this found for the plaintiff. He, however, dismissed the suit for ejectment on the ground that the plaintiff had not served a written notice to quit on the defendants.

Digitized by Google

The Subordinate Judge on appeal reversed this decision, holding that no written notice to quit was necessary. As to the defendant's right of occupancy in the disputed land, the Subordinate Judge agreed with the Moonsiff.

The defendant Gholam Mehdee (who appears also on behalf of his brother's heirs) appeals specially, and Mr. Gregory on his behalf contends (1) that there was no determination of the tenancy by any legal steps taken by the plaintiff; and (2) that there was no decision as to the defendant's right of occupancy.

With regard to the first objection, we observe that the plaintiff's allegation that he had sent a verbal intimation to the defendants that they must quit his land was never challenged by the defendant at any stage of the case in the Courts below. There was consequently no issue fixed, and no evidence called for to prove the point. The question decided was whether a written notice was or was not necessary: that a verbal notice was given was never denied. There is nothing in the law that required a written notice to be served on the defendants, nor has Mr. Gregory showed us any authority for the contention. It has been found as an undisputed fact by the Court below that verbal notice was given to the defendants, and on this point therefore the special appeal fails.

With regard to the second, Mr. Gregory contends that his client Gholam Mehdee was no party to and is not bound by the kubooleut for 5 years which has been filed by the plaintiff. But the kubooleut is in the joint names of both brothers, and, although the decree for rent brought by the mustajee in 1865 was against Golam Nukkee only, it does not follow that the other brother was not bound. At all events the kubooleut was evidence as to the nature of the defendant's holding, and upon it and other evidence in the case both Courts came to the conclusion that the defendants had not been in possession of the disputed land for 12 years, and had therefore no right of occupancy. As to their plea of purchase of such right from an older kastkar, the fact has been found against them by both Courts. The kobala under which defendant made his claim is distinctly found by the Subordinate Judge to be a collusive fabrication.

The plaintiff is newly come into the putnee, and the defendant ryots seem to have taken advantage of his ignorance. It has been found as a fact that they have no right to retain the land without the consent of the putneedar.

The special appeal is dismissed with costs.

Mitter, J.—I also concur in thinking that this special appeal must be dismissed with costs. The plaintiff distinctly alleged that, before instituting this suit, a notice was given to the defendant. This fact was never denied. Neither was it alleged that this notice was not sufficient in law to determine the defendant's tenancy. There was only one issue before the Moonsiff, *viz.*, whether the defendant has a right of occupancy in the land in suit. This issue was decided by him against the defendant, but he nevertheless dismissed the suit upon the ground that the defendant before he could be evicted was entitled to a *written* notice, and it was admitted before him that no such *written* notice had been given. It is, therefore, clear that there was no question before that Court as to whether there was any notice, either written or verbal. Mr. Gregory for the special appellant does not attempt to support the decision of the first Court upon the ground on which it is founded, but he contends that the plaintiff cannot succeed in this action without establishing that a sufficient notice had been given to the defendant to determine his tenancy. I do not think he is entitled to raise this question for the first time in special appeal. Looking to the allegation in the plaint upon this matter, which was never denied by the defendant, and finding that there was no issue framed in respect of it, I think it must be taken that it was an admitted fact in the case that a sufficient verbal notice had been given to the defendant. This ground of special appeal, therefore, must fail.

As regards the next ground, I think it does not arise; because whether the special appellant is legally bound by the kubooleut produced in this case or not, the Lower Appellate Court has upon the evidence come to the conclusion that the defendant's alleged possession for more than 12 years has not been made out, and his possession for a much shorter period has been held under the kubooleut in question. Therefore, upon this finding it is quite immaterial to enquire whether he was bound by the kubooleut or not.

The special appeal must, therefore, be dismissed with costs.

Digitized by Google

[PRIVY COUNCIL JUDGMENT.]

The 10th February 1875.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

Declaratory Decrees — Code of Civil Procedure (Act VIII of 1859), s. 15—Title to future Interests—Suits by Reversioners.

On Appeal from the High Court of Judicature at Madras.

Strimathoo Moothoo Vijia Ragoonadah Ranee Kolandapuree Natchiar and others,

versus

Dorasinga Tever and others.

The Code of Civil Procedure (Act VIII of 1859), s. 15, must be construed upon the principles, and by the light of the decisions, of the English Courts of Equity upon the 15th & 16th Victoria, Cap. LXXXVI, s. 50, which is in precisely the same words, and the construction which must be put upon it is that a declaratory decree cannot be made unless there is a right to consequential relief capable of being had in the same Court or in certain cases in some other Court.

The mere quieting of doubtful titles is not sufficient reason for a declaratory decree; and it appeared to their Lordships to have been very reasonably ruled in India, that the Court will not try questions of title as to future interests where neither claimant has a right to present possession, especially questions of title which may never arise.

A suit by a reversioner to restrain a widow or other Hindoo female from acts of waste, although his interest during her life is future and contingent, must be brought with that object and for that purpose alone, and the question to be discussed would be solely between him and the widow: he could not, by bringing such a suit, get, as between him and a third party, an adjudication of title which he could not get without it.

THIS is an appeal against the decree of the High Court of Madras affirming a decree of the Civil Judge, of which the ordering part is in these words:—"The Court doth "order and declare that, as between the "plaintiff and second defendant, plaintiff be "declared the next in succession to the "Shevagunga zemindary, that plaintiff's "claim to maintenance and apartments be "dismissed, and that he pay so much of his "own costs as may be found due thereon." There was no appeal to the High Court against the latter part of the decree dismissing the plaintiff's claim for maintenance and apartments, and therefore that which is the subject of the appeal must be taken to be the declaration of the two Indian Courts that the plaintiff is the next in succession to the Shevagunga zemindary.

The title to this zemindary was the su
of a very long litigation, which was fi
closed by a judgment of this tribunal in
year 1863. The points then decided
first, that the zemindary was in the n
of an impartible raj, to be held by
member of the family; secondly, tha
zemindary, having been granted by
Madras Government, after an escheat, t
istimirar zemindar, was to be treated
self-acquired property; thirdly, that
right of succession to it was to be
mined, not by any particular custom, b
the general Hindoo law prevalent in
part of India, with only such qualifica
as might follow from the impartible cha
of the subject. These propositions we
least in the latter stages of the litig
not much disputed. That which was
contested between the parties was that
if the istimirar zemindar were, as he
been found to be in the strict sense of
term, a member of an undivided Hin
family, the succession to this zemind
inasmuch as it was his separate self-acq
property, was to be determined by the
which regulate the succession to the pro
of one separate in estate, and conseque
that his wife, daughter, and daughter's
were entitled to inherit it in preferen
a brother, a brother's son, or any
remote collateral in the male line. Thi
point had been first raised by the zemin
last surviving widow, Angu Muthu Nat
in a suit commenced in 1845. It
decided against her by the Judge of
instance in 1847. She appealed again
decree to the then Sudder Court of Ma
but died in 1850 before her appeal
heard. Thereupon there ensued a
complicated and confused litigation am
the descendants of the istimirar zemi
touching their respective titles to succe
the right claimed by the deceased wi
and to prosecute her appeal. The clai
were first Kathama Natchiar, who i
first on the record of the present appel
her sister of the whole blood, and he
sister, all of whom seem to have
daughters of the zemindar, then havi
being capable of having issue; seco
Sowmia Natchiar, a fourth daughter,
was a childless widow; and thi
Moothoo Vadooga, a grandson of the
mirar zemindar by a deceased daughter,
as would appear by the pedigree adm
in this cause, an elder brother of the pr
respondent, who is since dead. The
judgment of this Committee determined

Digitized by Google

the question of representation raised between these parties, and also the question of succession raised in the widow's suit, against the person claiming as nearest male heir in the collateral line of the istimirar zemindar. It determined these questions by a declaration in these words :—"We shall therefore "humbly recommend Her Majesty to reverse "the decrees and orders complained of by "this appeal ; to declare that the suit of "1856, which appears to us to have resulted "from erroneous directions given by the "Sudder Court,"—that was a suit brought by the widow as an original suit,—"ought "to have been and ought to be dismissed ; "and in the suit of 1845, to declare that "Sowmia Natchiar and Moothoo Vadooga "were not, nor was either of them, but that "the appellant and her sisters were, as "against the respondent, entitled to prose-"cute the appeal, and to recover the zemin-"dary : this declaration to be without pre-"judice to the rights of the appellant and "her sisters *inter se.*" The sisters, as appears by the admitted pedigree in this cause, have since died. There is indeed a statement in Mr. Moore's Report that they were dead at the time when the judgment was pronounced, but, however that may be, it is certain that under the order of Her Majesty, made in pursuance of that judgment, the first appellant became the zemindar of Shevagunga, taking it as the heir of her father next in succession to the widow.

That having been the state of things for some years, the present respondent brought the suit, out of which this appeal has arisen. The first paragraph of his plaint claimed "to recover the zemindary of Shevagunga "for the plaintiff as the eldest surviving "male heir of the istimirar zemindar." But this somewhat desperate attempt to re-open the question which had been closed by the judgment of this Board was shortly afterwards abandoned, and by a subsequent proceeding he withdrew the claim to any right to immediate possession, and amended his plaint accordingly. The plaint then went on to pray in the alternative,—"first, "to have a declaratory decree passed, estab-"lishing the plaintiff's right to succeed to "the said zemindary as next heir after the "death of the first defendant, and adjudg-"ing her to pay him Rs. 60,000 per "annum for maintenance, and further declar-"ing him entitled to immediate posses-"sion of a portion of the palace, No. 1, "which was occupied and enjoyed by his "maternal grandmother and mother during "their lifetime ; secondly, to declare him "entitled to immediate management of the "devastanams, pagodas, and choultries situ-"ated in the said zemindary, and of the "lands bestowed on them, to receive the "honors done by the said devastanams and "choultries, and to conduct the affairs there-"of ; thirdly, to grant to him such further "or other relief as the nature of the case "will admit of." The plaint then stated the title of the plaintiff, which is in effect, that inasmuch as upon the death of the present zemindar the persons entitled to inherit and to succeed to the zemindary would, according to the ordinary course of Hindoo law, be the grandsons of the istimirar zemindar if the estate were partible, he, being the eldest of such grandsons, and the estate being impartible, must be taken to be, by right of primogeniture, the person next in succession to the zemindary. The plaint then raised a case of waste against the first defendant (the zemindar). After mentioning certain leases which are no longer the subject of dispute, it went on to say :—"The first "defendant has not leased to the sixth "defendant the punnai (cultivated by the "owner) and kolkriam (purchased) lands "belonging to the said zemindary, which was "put in her possession by virtue of the "decree of Her Majesty in Council, but she, "notwithstanding her being a widow, has "alienated, contrary to law, a great part of "the said lands, and pledged the state jewels, "and incurred debts so as to affect the per-"manent income of the zemindary." It then stated some special grounds for coming into Court. It said :—"The first, second, third, "fourth, and fifth defendants and others have "combined together to defraud the plaintiff "of his right to the said zemindary, and "the third, fourth, and fifth defendants have "executed an agreement to their brother, "the second defendant, assigning to him "their interest in the said zemindary, which "they pretend to have on the death of the "first defendant. The first defendant has "also executed a document to one Ponnoo-"samy Tever, whose daughter was lately "married to the second defendant, author-"ising him (the said Ponnoosamy Tever) "to establish the right alleged by the first "defendant to be possessed by her son, the "second defendant, to succeed to the zemin-"dary after her death, and to exercise other "powers in prejudice to the plaintiffs' inter-"ests in the said zemindary." Then followed the case made for the relief prayed in respect of the management of the charitable institu-

Digitized by Google

tions and for maintenance, which it is unnecessary to state in detail.

The defendants to the suit appeared and set up various defences, the first and second defendants impeaching the title of the plaintiff upon several grounds; the third, fourth, and fifth defendants setting up a case that the zemindary to which their mother had succeeded had either always been or had become her stridhanum; that according to the proper course of succession it would, upon their mother's death, devolve upon them, but that they had assigned and relinquished by deed their rights in favor of their brother, the second defendant. Upon these pleadings the following issues were settled: —"1. Whether or not according "to Hindoo law petitioner is entitled to succeed to the zemindary of Shevagunga at the "death of the present Ranee? 2. Whether "or not petitioner is entitled to succeed "to the said zemindary at the death of the "Ranee by virtue of any peculiar custom which obtains in that zemindary? "3. Whether or not petitioner is estopped "by this being '*res judicata*' from setting "up any peculiar custom? 4. Whether or "not petitioner is immediately entitled to "the maintenance claimed or what maintenance as such, or to apartments in the palace, "and what apartments? 5. Whether or not "petitioner's claim to maintenance and apartments is barred by the law of limitation? "6. Whether or not petitioner is entitled to "the immediate management of the devastanams and chuttrams in the zemindary, "and to the honors connected with the "said management? 7. Whether this is a suit "in which a declaratory decree can be given "at all?"

From the judgment of the Court of first instance it appears that the second, third, and sixth of these issues were abandoned. That judgment conclusively disposed of the fourth against the plaintiff, and consequently made it unnecessary to adjudicate upon the fifth. But having decided the seventh issue, *viz.*, whether the suit was one in which a declaratory decree could be given at all in the plaintiff's favor, it proceeded to decide the first issue also in his favor, and thereupon made the declaration which is the subject of this appeal. The questions raised by these issues were the only questions which were carried to the High Court, and that Court affirmed the decree of the Lower Court upon both points.

Their Lordships, feeling that if the seventh issue has been improperly found in favor of the plaintiff, and this is a case in which a declaratory decree ought not to be given at all, it would be wholly unnecessary for them to discuss the first issue, have in the first instance confined the argument to the first of these questions, and now proceed to give judgment upon it.

They at first conceived that the power of the Courts in India to make a merely declaratory decree was admitted to rest upon the 15th Section of the Code of Civil Procedure, the effect of which has been so much discussed. Mr. Doyne, however, raised some question as to that, and suggested that the power was possessed by the Courts in the mofussil before the Code of Procedure was passed, and had not been taken away thereby. No authority which establishes the first of these propositions was cited; and their Lordships conceive that if the Legislature had intended to continue to those Courts the general power of making declarators (if they ever possessed such a power), it would not have introduced this Clause into the Code of Procedure, which, if a limited construction is to be put upon it, clearly implies that any decree made in excess of the power thereby conferred would be objectionable, the words of the Section being:—"No suit shall be "open to objection on the ground that a "merely declaratory decree or order is sought "thereby, and it shall be lawful for the Civil "Courts to make binding declarations of "right without granting consequential "relief." Nor does any Court in India since the passing of the Code seem to have considered that it had the power of making declaratory decrees independently of that Clause.

The point, therefore, to be determined upon this appeal is, what is the true construction and effect to be given to that Clause. It has been broadly urged at the bar that the discretion given to the Courts is absolute, or at least controlled only by those reasonable considerations upon which Courts of justice may be presumed to act in the particular case brought before them; and that in every case in which they think fit to make a declaratory decree under that Clause they are competent to do so, subject of course to having the exercise of their discretion controlled by the Appellate Court in cases in which the latter may think there are sufficient grounds for interfering with a discretion which the Legislature has vested in the Lower Court. On the other hand, it is contended that the Clause must be construed upon the principles and by the light of the

Digitized by Google

decisions of the English Courts of Equity, upon the 50th Section of the 15th & 16th Victoria, Cap. 86, which is in precisely the same words, and that the true limitation of the power of the Courts is that a declaratory decree is not to be made unless there is a right to consequential relief, which, although not asked for, might, if asked for, have been given.

We have been referred to a vast number of authorities, some to show what has been the construction given to this Clause in the Presidency of Bengal, some to show what construction has been given to it in the Presidency of Bombay, and some to show that a contrary construction has been put upon it in the Presidency of Madras. We have also been referred to three decisions of this tribunal, which, if clear and explicit on the point, are of course binding upon us. Their Lordships think it will be sufficient as to the Indian cases to say that although the cases in Bengal are not uniform, and some of the Judges there have occasionally used expressions which imply that the Courts have a wide discretion in this matter, still the balance of authority is in favor of the limited construction which the appellants would put upon the Clause. In Bombay that seems to be even more decidedly the case, although the Bombay decisions to which we have been referred are not so numerous as those of the Courts in Bengal. It is obvious that an enactment which is intended to apply to all the Courts in India, and which is also a modern enactment, ought to receive the same construction in all those Courts, and that no inconsistent course of practice should be allowed to spring up in any of the Presidencies. That construction must be governed by the decisions of this Board, and their Lordships in the course of the argument intimated an opinion that the three decisions which have been cited do in fact admit the authority and binding force of the decisions in England, and establish that, with such slight qualifications as may be required by the different circumstances of India and the different constitution of the Courts in that country, the application of the Clause is to be governed by the same principles as those upon which the Court of Chancery proceeds.

In the first of these cases (that of Sreenarayan Mittro, decided on the 15th of January 1873), there is a distinct reference to the case of Rook *v.* Lord Kensington. The learned Judge who delivered the judgment of this Committee said :—"It has been "held that under the 15th & 16th Victoria, "Cap. 86, Section 50, a declaratory decree "cannot be made unless plaintiff would be "entitled to consequential relief if he asked "for it. (Rook *v.* Lord Kensington, 2 K. "& J., 756) The 15th Section, Act VIII "of 1859, is in similar terms. The plaintiff, "upon the facts so found, is not entitled to "any relief against the defendant. It has "been shown that, treating the documents "as mere agreements between the plaintiff "and the father of the child, the plaintiff "could have no right to maintain the present "suit." He no doubt afterwards observed : —"It is not a matter of absolute right to "obtain a declaratory decree. It is discre- "tionary with the Court to grant it or not, "and in every case the Court must exercise a "sound judgment as to whether it is reason- "able or not under all the circumstances "of the case to grant the relief prayed for." It appears, however, to their Lordships that that paragraph is far from claiming an unlimited discretion. The earlier part of the judgment shows that the power is limited by the construction put upon an enactment in the similar words in Rook *v.* Lord Kensington, and what follows is merely to the effect that even in cases in which some consequential relief might, if prayed, have been granted, it would still be a matter of discretion whether the Court should make a mere declaration in the particular case.

The next case was that which has been shortly called the case of Fyz Ali Khan, decided on the 22nd of January 1873. Upon this point their Lordships then said :— "It must be assumed that there must be "cases in which a merely declaratory decree "may be made without granting any conse- "quential relief, or in which the party does "not actually seek for consequential relief "in the particular suit; otherwise the 15th "Section of the Code of Civil Procedure "would have no operation at all. What "their Lordships understand to have been "decided in India on this article of the Code, "and in the Court of Chancery upon the "analogous provision of the English Statute, "is that the Court must see that the declara- "tion of right may be the foundation of "relief to be got somewhere. And their "Lordships are of opinion that that condition "is sufficiently answered in the present case "even if it be assumed that no other con- "sequential relief was in the mind of the "party or was sought by him than the right "to try his claim to enhance in the other forum "in which he is now compelled by statute "to bring an enhancement suit." The case

Digitized by Google

there was that the plaintiff had sought as zemindar to enhance the rent of a tenant. He was met by the objection that the zemindary right was not in him. He then had to go, as he could only go for a final determination of that question, to the Zillah Court, but the Zillah Court not having the power to give him the consequential relief in order to which he sought that declaration, namely, the trial of his right to enhance, could only make the declaration, leaving him to seek for his consequential relief in the Revenue Court.

The correctness or effect of this decision is not affected by the fact which Mr. Doyne pointed out, that the plaintiff afterwards did go to the Revenue Court, and there, upon the merits of the question being tried, failed to establish his right to enhance.

The most recent case is that of the Rajah of Pachete, decided on the 15th of December 1874. The judgment then delivered contains this passage :—"Their Lordships "do not think it necessary to determine "whether or not the High Court were right "in the conclusion they came to as to the proof "or the rebuttal of proof of the bromuttur "tenure, because in their Lordships' opinion "the judgment dismissing the suit is main-"tainable on totally different grounds. This "is in substance a suit for a declaration "of title, and it is a suit to set aside, not "any deed nor any act, but a mere allegation "of the defendants that they had a certain "tenure. In their Lordships' view, such "a suit is not maintainable." After giving the words of the Clause, the judgment proceeds :—"A similar Clause in this country "has been held to give a right of obtaining a "declaration of title only in those cases "where the Court could have granted relief "if relief had been prayed for; and that "doctrine has been applied to this Clause in "the Indian Act. Now applying that test, "in their Lordships' opinion this suit is not "maintainable. The Rajah was not entitled "to relief in the shape of an order giving "him possession, inasmuch as he was in "receipt of the rents and profits, and he "sought for and could obtain no other "description of possession than that which he "had." There is really no conflict between this decision and that which had been ruled in the case of Fyz Ali. In the case of Fyz Ali the plaintiff sought to establish the zemindary title, which was properly triable in the Zillah Court, in order that on the title thereby established he might bring a fresh enhancement suit in the Revenue Court.

In this case of the Rajah of Pachete zemindary title was admitted by all the de ants upon the proceedings; and the que which the Rajah sought to conclude declarator was that within his zemindary was no such bromuttur tenure as that some of the defendants alleged to exi limitation of the right to enhance, whi a zemindar he would presumably have. short, he wished to get a declaration, effect of which would be to prevent the trial in the Revenue Court of the question to be tried there—*viz.*, the que whether he as zemindar was entitle enhance the rents of his tenants or not.

It seems to their Lordships that three cases do all more or less affirm tha Indian enactment is to be construed a English Courts have construed the si provision in the English Statute, but much as this question has been so discussed at the bar, and there treated concluded by those decisions, and as desirable to have an authoritative dec upon it, their Lordships think it right t that if these three cases had not decided, and if the question were b them as *res integra*, they would come t above-mentioned conclusion, and I will as shortly as I can the reasons upon w they would do so.

It is clear that very shortly after passing of the English Statute, in fact i course of the following year, the constru of its 50th Section came in question in Court of Chancery. The first decisio Vice-Chancellor Wood, which is report the Appendix to the 10th volume of H Reports, no doubt states somewhat br the discretionary power of the Cour make declarators under that enactment in the two other cases which were de a month or two afterwards, namely,—the of Greenwood *v.* Sutherland, and Garli Lawson,—the learned Vice-Chanc receded from that, and held that the po of the Court were not so enlarged by statute as to enable him to make declaration touching future interests du the life of a tenant for life. In the ca Gurlick *v.* Lawson he said :—"No "declaration in the lifetime of the tenan "life with regard to the interests of "parties entitled in reversion could not "been made in a cause at the time "statute passed, and therefore could "have been made on a special case. T "came the new Act, which merely said "a suit should not be open to objectio

Digitized by Google

"the ground that a merely declaratory "decree or order was sought. It enabled "the Court, in its discretion, where it should "appear to be necessary for the administra- "tion of an estate, or to the relief to which "a plaintiff might be entitled to make a "decree, notwithstanding it should be merely "declaratory. But this was not a case in "which it was necessary to do so."

The question next came before Vice-Chancellor Kindersley in Jackson *v.* Turuley. At the close of his elaborate judgment on the particular case, the learned Judge says:— "I am of opinion that this question cannot "be litigated; that the representative of a "deceased lessee cannot file a bill against the "lessor to litigate the question whether, in "the event of a breach of a covenant taking "place, the lessor would have a right "founded upon it, and I may observe that "the last branch of the Section is not unim- "portant." It says:—"It shall be lawful for "the Court to make binding declarations of "right, without granting consequential relief. "That seems to imply that it contemplates a "case in which the Court is capable of "giving consequential relief. Here there is "not merely no consequential relief asked, "but none is capable of being given."

In the case of Rook *v.* Lord Kensington, Vice-Chancellor Wood also put the same construction upon the words of the Clause. He said:—"The form of that Section of the "statute implies that there is a consequential "relief which might be granted in each case "when the right has been so declared, but "that the parties are not to be compelled to "ask for that relief, and they may satisfy "themselves by simply asking a declaration "of right, and not pursuing the matter "further."

That decision was followed shortly afterwards by the case of Lady Langdale *v.* Briggs, which is the more important, because there, as here, the question was whether the Clause empowered the Court to declare future interests. Lord Justice Turner went at great length through the earlier cases, in order to show that it was against the general course and practice of the Court to do this; that that had not been altered by his own Act, enabling the parties to state a case for the adjudication of the Court; and then he proceeded to deal with the argument which had been raised before him, to the effect that under the more recent statute, the 15th & 16th Victoria, Cap. 86, that power was given. He says:—"Some aid to the appellant's "argument on this part of the case was also "attempted to be drawn from the 50th "Section of the 15th & 16th Victoria, Cap. "86, the improvement of Jurisdiction Act, "but I take the same view of that enactment "as the Vice-Chancellor Wood seems to "have taken of it in Garlick *v.* Lawson— "that it does not extend the cases in which "declarations of right may be made, but "merely enables the Court to declare rights "without following up the declarations by "the directions which, according to the old "practice, would have been necessarily "consequent upon them." Those directions which according to the old practice would have been necessary and consequent, would have involved consequential relief in one shape or another. There is, therefore, no ground for saying that the judgment of Lord Justice Turner did not go to the full extent, as to the construction of the Clause, of the judgments of Vice-Chancellor Wood in Rook *v.* Lord Kensington, and Vice-Chancellor Kindersley in Jackson *v.* Turuley.

What then has been the history of this Clause in India? It appears that before the passing of the Code of Procedure, it had been extended to India by Act VI of 1854, the 19th Section of which is in precisely the same words as the English enactment. I may remark that some of those who sat in the Supreme Court of Calcutta were always anxious that when an English Statute was extended to the Presidency Courts, it should be so extended in precisely the same words, in order that those Courts might have, on questions of construction, the advantage of the English authorities, and that it should not be open to counsel to make nice distinctions upon the varying language of the two statutes. In this instance that principle seems to have been acted upon by the Legislature, and not long after the Indian Act was passed the question of its construction appears to have come before the Supreme Court in the cause of Sreemutty Rajcoomaree Dossee *v.* Nobocomar Mullick and another (Boulnois' Reports). That Court was bound to act upon the English authorities, and accordingly that portion of its judgment which dealt with this question is in these words:— "One argument, which has been strongly "pressed in support of this view, is founded "on the 29th Section of Act VI of 1854. "But that enactment only removes the objec- "tion to the suit, which consists in its seeking "merely a declaration of right without a con- "sequential relief. It leaves untouched the "objection that may consist in the want of "sufficient interest in the plaintiff to main-

Digitized by Google

"tain such a suit, or in the absence of "material parties interested in the question. "And the cases cited by Mr. Advocate-"General show that the Courts at home, "neither under the similar Section in the "English Statute, nor under Sir George "Turner's Act, will exercise their discretion "in declaring rights where the parties prin-"cipally affected are not before them." The cases cited were the cases which had then been decided on the construction of the English Act. And this decision shows that the construction which had obtained in the Court of Chancery was adopted and acted upon by the Supreme Court of Calcutta.

Then came Act VIII of 1859, or the Code of Procedure, in framing which the Legislature thought fit to pick out of Act VI of 1854 the 19th Section, and to embody it in the very same words in the new Code. It seems to their Lordships unreasonable to suppose that the Legislature did not mean to use the words in the sense which by judicial construction they had been obtained. Again, it is to be observed that when the Supreme Court of Calcutta ceased to exist, and the High Court was created, the Charter of the new Court required that Court to be guided in its original jurisdiction by the principles which had governed the Supreme Court. Unless, therefore, the limited construction put upon the Clause by the Supreme Court is to prevail generally in all the Courts of India, we must come to the absurd conclusion that the same words are to be interpreted by the High Court in one sense when it is exercising its original jurisdiction or sitting on an appeal from a decree made under that jurisdiction, and in a different sense when it is sitting on an appeal from a mofussil Court; and further that the Legislature has by the same form of words intended to make one law for the mofussil Courts, and another for those of the Presidency towns.

It appears, therefore, to their Lordships, that the construction which must be put upon the Clause in question is, that a declaratory decree cannot be made unless there be a right to consequential relief capable of being had in the same Court or in certain cases in some other Court. They admit the qualification introduced by the case of Fyz Ali.

With respect to the course of decision in the Presidency of Madras, it is to be observed that some of the earlier cases decided there adopted the English construction. In others, the Judges who claimed a wider discretion as to making declaratory decrees, have assigned as a reason for its exercise that there does not exist in India the power of entertaining a suit to perpetuate testimony. That reason does not apply to the present case, in which there is no testimony to perpetuate, but in no case is it a satisfactory reason. The proper remedy for such a defect in the administration of justice, if it exists, is an Act of the Legislature. It cannot be supplied by putting an erroneous construction, or a different construction from that which prevails in other parts of India, upon a statute which has no reference to the subject. It may be observed further upon the Madras cases that the Courts there do not appear really to have claimed, as Mr. Doyne has claimed for them, an uncontrolled discretion in making declaratory decrees. The judgment of Chief Justice Scotland in this very case certainly does not go so far. He says :—"It has been decided "by this Court that the rule of the Equity "Courts in England is not applicable to "declaratory suits here, and it is now settled "that a suit praying nothing more than a "declaration of title is maintainable under "the 15th Section of the Code of Civil Pro-"cedure, although no consequential relief be "grantable upon the declaration, if a good "ground for seeking the protection of such "a suit is shown to exist." What I have already said on the part of their Lordships shows that they dissent from that position; but still the very proposition admits that there must be some special ground "for seeking the protection of such a suit." He then refers to the last decided case, and the conclusion which he draws from the decision is this :—"To support such a suit there must "appear to have been some act done which "had worked or was likely to cause injury "or serious prejudice to the plaintiff's alleged "title, and in the present case I think that "ground does appear." Then he proceeds to consider the special grounds which exist in this case. Mr. Justice Holloway goes further, and says that the mere quieting of doubtful titles would be a sufficient reason and a better reason than the fact of alienations having been made. The principle so stated, if acted upon, would open the door to the determination of future interests whenever one party chose to think it desirable that a dispute as to title which might at any time afterwards crop up, should be determined by a declarator.

Having said thus much on the construction of the Act, their Lordships will now deal with the arguments which have been addressed to them to show that even upon

Digitized by Google

the limited and strict construction of the enactment this decree may be maintained. The first point upon which it is desirable to observe is that of the claim to maintenance. Upon that it is only necessary to say that the suit must now be treated as if the claim to maintenance had never been put forward. There has been a final adjudication between the parties as to the right to maintenance. It was held by the Lower Court that, even if the plaintiff were unquestionably the next in succession to the zemindary, he would have no right to claim present maintenance from the zemindar, and there was no appeal from that decision to the High Court.

It will be convenient to consider next the grounds which the High Court of Madras seems to have considered sufficient to justify the declaration. The Chief Justice says :—"It appears that the first defendant favor-"ing the second defendant's title, and con-"certing with him in opposition to the plain-"tiff, had employed an agent, and executed "a power of attorney to him, for the purpose "of assisting the second defendant to possess "himself of the zemindary, and withhold "possession after her death. This, without "reference to the other acts alleged, is suffi-"cient to show an extreme determination of "hostility towards the plaintiff, and there "can be no doubt, I think, that serious injury "to the plaintiff's right is the probable, if "not certain, result of the opposition thus "begun." It appears to their Lordships that the defendant, the zemindar, was perfectly competent to grant that power of attorney, and that there is nothing in it which would give the plaintiff a right if he had brought a suit for that purpose to have it set aside. It can, from the very nature of the instrument, operate only during the zemindar's lifetime, and we are not to assume that any act will be done under it which the plaintiff would have a right to impeach ; but if any such act is done under it ; as, for instance, if she were to devolve the succession upon her son, so that his interest might become absolute, or the like, their Lordships, by their decision upon the present question, would by no means preclude the plaintiff from seeking to impeach that act, and to treat it as invalid. They do not prejudge any question of that kind which may arise. Mr. Justice Holloway, as before remarked, rested his judgment broadly on the necessity of quieting titles, which their Lordships think is a ground far too wide for adoption, and one that cannot possibly justify the declaration in this case, because, independently of the construction of the statute, it appears to have been very reasonably ruled in India that the Court will not try questions of title as to future interests where neither claimant has a right to present possession, especially questions of title which, like the present, may never arise.—See Pranputty Koer, mother and guardian of infant Isreenundun *v.* Lall Futteh Bahadoor, 8 Sevestre, 277.

A further question is raised by the pleadings, which was hardly adverted to in the argument,—namely, the title set up by the sisters and the grant of their interest to the second defendant ; but that cannot give the plaintiff a right of action in this case if it does not otherwise exist. That transaction cannot affect the interests of the plaintiff ; if these ladies would have no title against him they cannot have given a better title than they had themselves to the second defendant. It, at most, raises another point to be determined, should the title to this zemindary come, on the death of the existing zemindar, to be properly litigated between the plaintiff and the second defendant.

The point which, though not adverted to in the judgment of the High Court, has been mainly pressed upon their Lordships by the learned Counsel for the respondents, is, that the plaint originally made a case of waste, that it was necessary that the right of the plaintiff as nearest reversioner should be ascertained in order to support such a suit, and that if the suit had been tried out as it was at first framed, there would have been a case for consequential relief. The course the case took was that when it came before the Judge for the settlement of issues, he thought that the question of waste ought not to be tried in this suit. There was afterwards an application made to him to frame an additional issue, which he rejected ; and the reasons for his coming to that conclusion are given at page 11. They are the following :—"At "the settlement of issues the Court was of "opinion that the question of alienation of "the revenues of the zemindary was not one "which had any place in the present suit, "which should be confined as much as possi-"ble to the real object in view, which is to "ascertain whether or not plaintiff is the "proper person to succeed to the zemindary "at the death of the Ranee. At present "plaintiff has no title either in possession or "expectancy, and until he has established "his right as remainderman, he is not in a "position to question anything that may be "done in regard to the disposal of the pro-"perty by the present proprietor. Moreover,

Digitized by Google

"it would be impossible to frame an issue on "this point, when the property said to be "alienated is not distinctly specified, and "when the parties who must necessarily be "in possession are not parties to the suit. It "is not contended that these alienations can "operate beyond the lifetime of the present "Ranee, and therefore if plaintiff is success- "ful in establishing his right to succession, "he will have ample opportunity in future "of preventing injury to the property. If, "on the other hand, he is unsuccessful, the "disposition of the property is a matter "with which he has no concern." The plaintiff appears to have acquiesced in this interlocutory order. If he had thought it had improperly affected his case, he might have raised before the Appellate Court the question of its propriety, under the Section of the Code which enables him to do so, and that question would then have been regularly before us. Considering the frame of the suit. their Lordships do not think the order was improper or unreasonable.

The arguments now under consideration are founded on the right of a reversioner to bring a suit to restrain a widow or other Hindoo female in possession from acts of waste, although his interest during her life is future and contingent. Suits of that kind form a very special class, and have been entertained by the Courts *ex necessitate rei*. It seems, however, to their Lordships that if such a suit as that is brought, it must be brought by the reversioner with that object and for that purpose alone, and that the question to be discussed is solely between him and the widow; that he cannot by bringing such a suit get, as between him and a third party, an adjudication of title which he could not get without it. Here if the plaintiff had brought his suit to restrain the widow from acts of waste, he might, no doubt, have had to prove, not merely the acts of waste alleged, but a title sufficient to give him a *locus standi* in Court. Their Lordships are not prepared to say that by showing that he was a grandson of the istimirar zemindar, although a doubtful question might thereafter arise between him and the second defendant as to which should succeed to the zemindary, he would not have established a sufficient *locus standi* against the widow, and the right to have her acts of waste restrained for the protection of the estate. This, however, would not necessarily give him a right to bring the second defendant into Court in order to obtain a final adjudication of title against him.

It appears, therefore, to their Lords that even if the plaintiff had proved ac waste against the widow, which he has done, that would not have given him a r as against the second defendant to have question which arises between them de mined by a declarator.

Upon these grounds, their Lordships t that both the Courts below have come wrong conclusion upon the seventh is and holding that, they conceive it would improper for them to intimate any opinio to the correctness or incorrectness of very learned judgments given in India on first issue. Consequently it will be Lordships' duty humbly to advise Majesty, on the finding upon the sev issue, to dismiss the suit of the respond but without prejudice to any question of to the zemindary which he may hereafte entitled to assert on the death of the defendant, the zemindar. We think that as he brought a suit which he ought not have brought, he must pay the costs of suit in the Indian Courts and those of appeal.

The 5th March 1875.

Present :

The Hon'ble E. G. Birch and W. McDonell, *Judges.*

Special Appeal—Remand—Issues.

Case No. 1728 of 1874.

Special Appeal from a decision passe the Subordinate Judge of Moorsh bad, dated the 29th April 1874, *rev ing a decision of the Officiating Sud Moonsiff of that district, dated the 2 February* 1873.

Suttobhama Bibee (Defendant) *Appella*

versus

Hurruck Chand Golecha (Plaintiff) *Respondent.*

Mr. C. Jackson and *Baboo Obhoy Chu Bose* for Appellant.

Baboos Ashootosh Dhur, Nil Madhub B and *Jadub Chunder Seal* for Responde

A suit which had been dismissed by a Moonsiff remanded by the Subordinate Judge for trial of cer issues four in number. The Moonsiff returned the without any finding on the second and third iss Upon this the Subordinate Judge, after quoting finding of the Moonsiff and without any decision on evidence, proceeded to decree the suit.

Digitized by Google

As the High Court in special appeal could not go into the evidence, it remanded the case with a view to the Subordinate Judge taking such evidence as was necessary to decide the said issues, if he considered that the evidence taken by the Moonsiff was not sufficient.

Birch, J.—In this case the Moonsiff dismissed the suit upon two grounds: first, that there was no evidence on the record to show that the gomastah had authority to borrow money for the defendant; and secondly, that there was no satisfactory proof that the money borrowed from the plaintiff was applied to the karbar of the defendant's firm. On the case going before the Subordinate Judge on appeal, he remanded it under Section 354, directing the Moonsiff to try four issues which were set forth in his order of remand. The finding of the Moonsiff returned under that Section is far from satisfactory. In a very few lines he states that "monib," "malik," "mookhtar," "gomastahs" are one and the same person. The Moonsiff ought to have known that it was quite unnecessary to remand the case to him for a finding such as that. What the Subordinate Judge really required him to find was first, what was the position of Thakoor Dass Chowdhry gomastah on the date of the loan; and secondly, did it fall within the ordinary scope of his business to borrow money on account of his principal?

Upon these two points which formed the second and third issues sent down by the Subordinate Judge, the Moonsiff has come to no finding at all. Such being the case, we might reasonably have expected that the Subordinate Judge, if he saw reason to differ from the finding arrived at by the Moonsiff dismissing the suit, would either have insisted on his order being carried out in its integrity, or would himself have taken the additional evidence he had declared to be necessary to enable him to decide the second and third issues which he had sent down for trial. Instead of doing this, the Subordinate Judge in a very brief judgment merely quotes the purport of the finding arrived at by the Moonsiff and proceeds, without any discussion at all of the evidence on the record, to reverse the Moonsiff's decision and decree the suit.

Sitting as we are in special appeal, we are unable to go into the evidence ourselves, but we think it would be unsafe to allow a judgment expressed in such lax terms as that of the Subordinate Judge is to remain as the final judgment in this or in any other suit, and we are unable ourselves in special appeal to go into the evidence and give judgment in the case. We may observe that the Moonsiff found as a fact that this gomastah carried on a separate karbar of his own, and came to the conclusion that the money borrowed was borrowed by him on his own account. On this point, the finding of the Subordinate Judge is entirely silent. It is admitted that the defendant is monib, malik, gomastah, but that finding alone is not sufficient. It is necessary to find whether the money which he borrowed from the plaintiff was borrowed by him on behalf of the lady whose firm he represents, and this point has not at all been gone into by the Subordinate Judge. The case must be remanded, and the Subordinate Judge, if he considers that the evidence taken by the Moonsiff on his sending down the case under Section 354 is not sufficient, may take himself such evidence as he considers necessary to enable him to dispose of the second and third issues of his order of remand. The case will go back. The costs will abide the ultimate result.

The 5th March 1875.

Present:

The Hon'ble A. G. Macpherson, *Officiating Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Reviews—Act VIII of 1859 *s.* 376.

Application for Review of Judgment passed by the Hon'ble Justices F. A. Glover and A. G. Macpherson, on the 27th April 1865 *in Special Appeal No.* 3483 *of* 1864.

Heera Lall Ghose, one of the Defendants (Appellant) *Petitioner*,

versus

Ram Taruck Dey, Plaintiff, and others, Defendants (Respondents) *Opposite Party*.

Mr. Wood for Petitioner.

Baboo Sreenath Doss for Opposite Party.

The discovery of new evidence may make it proper to grant a review; but the circumstances must be very special, the more so when the application to review is made many years after the date of the decree, and the evidence discovered must be of a clear and conclusive character.

Macpherson, C.J.—The only question which is raised before us is, whether the petitioner is by reason of the discovery of the document of which he now propounds a copy, entitled to have the judgment which

Digitized by Google

we passed in April 1865, reviewed. The ground of the application is that the petitioner has recently discovered a mokhtarnamah filed in the Court of the Moonsiff of Cutwa, which, if it had been before the Court when the case was originally tried, would have been a very important item of evidence, and ought, as the petitioner contends, to have induced the Court to come to a conclusion on the facts different from that at which, in the absence of this document, the Lower Appellate Court arrived.

The question in truth is, whether a person against whom a decree is passed is entitled to have a review at any subsequent time (no matter how long) in case of his discovering the existence of evidence in his favor of the existence of which he was unaware at the time of the trial.

It is a perfectly well-known rule that excepting under very special circumstances parties must stand or fall by the case which they lay before the Court when their suit is being tried in the ordinary course; and that if any evidence is not made use of then it cannot be made use of afterwards. No doubt, instances occur in which under Section 376 of Act VIII of 1859, the discovery of new evidence may make it proper to grant a review. But the circumstances must be very special,—the more so when, as in the present instance, the application to review is made many years after the date of the decree,—and the evidence discovered must be of a clear and conclusive character.

In the present case, even supposing that the document propounded is genuine and that the petitioner could not by any possibility have known of it or produced it at the hearing, it is quite clear that it would be any thing but conclusive as to the rights of the petitioner. It is impossible, I think, to put it any higher than as being an item of evidence in the case which might or might not, if thoroughly investigated, have proved to the benefit of the petitioner. It is not to be forgotten that the existence of this paper is not inconsistent with the existence of a state of things which has been found by the Lower Appellate Court to be the true state of things. In short, I think it doubtful what the result of a trial with this evidence before the Court would be. That being so, it seems to me that it is not a case in which a review ought to be granted.

But further, although the petitioner states that he did not know of the existence of this document at the time the suit was tried, it by no means follows that he ought not to have known of it, and that if he had n due search he might not have discovere Moreover, all sorts of questions arise a the document itself, and the circumsta under which it is said to have been covered. It is impossible to say that t are not various matters of suspicion att ing to it.

Looking at it in all points of view, I no doubt that this application for re ought to be refused with costs, which w at Rs. 50.

Glover, J.—I am of the same opinion

The 8th March 1875.

Present:

The Hon'ble A. G. Macpherson, *Officiat Chief Justice*, and the Hon'ble E Birch, *Judge*.

Special Appeal—Onus Probandi.

Appeal under Section XV of the Le Patent from a decision passed by Hon'ble W. Ainslie, one of the Judg this Court, dated the 18th Dece 1874, *in Special Appeal No.* 685 *of* 1 *from a decision passed by the Sub nate Judge of Dacca, dated the December* 1873, *affirming a decisio the Moonsiff of that district, dated* 19*th March* 1873.*

Huree Mohun Mojoomdar, Plaintiff (Respondent) *Appellant*,

versus

Asgur Beharee and others, Defendan (Appellants) *Respondents*.

Baboo Sreenath Doss for Appellant

Baboo Kasheekant Sen for Respondent

---

* *Ante*, p. 56.

Digitized by Google

Where each of the parties has gone into evidence upon the issues raised in the Lower Courts, no question as to whether the *onus* lies on the one or on the other can arise in special appeal.

Macpherson, C.J.—It seems to us that the learned Judge who heard the special appeal has overlooked the fact that it was before him in special appeal and not in regular appeal. When the grounds of special appeal are looked at carefully, it will be seen that no one of them involves any point of law. All turn upon the facts as found and the evidence.

The important issues in the case were, first, whether the plaintiff's title was real, in other words, whether he was not holding benamee for one Huree Mohun Roy; and second, whether the defendant's mortgage was real and *bonâ fide*, or merely a collusive and fraudulent transaction set up in concert with Huree Mohun Roy with a view to get rid of the title of the plaintiff. These two issues were distinctly raised in the Court of first instance, and were tried and disposed of there, being found in favor of the plaintiff. The same issues were again discussed in the Lower Appellate Court, and the finding of that Court was again in favor of the plaintiff: that Court also finding in express terms that the mortgage of the defendant was not *bonâ fide*, but was fraudulently put forward by the defendant in collusion with Huree Mohun Roy in order to defeat the plaintiff's title. The parties having gone into evidence on these issues, and the Lower Courts having decided them upon that evidence, there really is no point of law which arises in the case on special appeal. It seems to us, therefore, that the learned Judge was wrong in entering as he did into the merits as between the parties. It also seems to us that as each of the parties did go into evidence upon the issues raised, no question as to whether the *onus* lies on the one or the other really could arise in this Court.

With every respect for the opinion of the learned Judge who tried the special appeal, we think that his decision must be set aside and the special appeal dismissed with costs, including the costs of this appeal.

The 8th March 1875.

Present:

The Hon'ble A. G. Macpherson. *Officiating Chief Justice*, and the Hon'ble C. Pontifex, *Judge.*

Letters—Evidence—Stamps—Agent—Interest.

Regular Appeals from the decisions passed by the Subordinate Judge of Purneah, dated respectively the 28th November and 2nd December 1873.

Cases Nos. 11 and 12 of 1874.

Situl Pershad (Plaintiff) *Appellant,*

versus

Monohur Doss and others (Defendants) *Respondents.*

Baboo Chunder Madhub Ghose for Appellant.

Baboo Mohesh Chunder Chowdhry for Respondents.

Cases Nos. 23 and 24 of 1874.

Monohur Doss (Defendant) *Appellant,*

versus

Situl Pershad (Plaintiff) *Respondent.*

Baboo Mohesh Chunder Chowdhry for Appellant.

Baboo Chunder Madhub Ghose for Respondent.

A letter containing an admission does not require a stamp before it can be admitted as evidence.

An agent retaining his principal's money, which he has not been required to pay, should not ordinarily be required to pay interest; but if his conduct has been fraudulent, he should be charged with interest.

Macpherson, C.J.—These four appeals are from decrees made in two suits brought by a principal against his agent to recover the balance due on his account. Monohur Doss and the representative of his deceased partner Chundee Pershad were defendants in one suit, and the other suit was against Monohur Doss alone. By a proceeding of the Subordinate Judge, dated 26th of November 1873, it appears that the suit as against the representative of Chundee Pershad was abandoned. The Subordinate Judge gave a decree for the plaintiff in each case. In the appeals Nos. 23 and 24, Monohur Doss appeals against these decrees.

Digitized by Google

The first objection he takes is, that the claim of the plaintiff, or some part of it, is barred by limitation. But it is, in our opinion, proved that the plaintiff attained his majority in Assar 1277 as alleged by him, and that these suits were instituted within three years from that date. Act XIV of 1859 governs these cases, and, under the circumstances, the suits are not barred in any way.

It is quite clear that these suits have not been properly tried, and that Monohur Doss has not had an opportunity of proving certain facts which it was essential for him that he should establish.

The first of these matters relates to the sums drawn out of Court by Monohur Doss in a certain suit against Mr. Forlong as manager for the Rajah of Durbhanga. The defendant admits receipt of these sums, but claims a one-fourth part of them as belonging to himself. In support of his claim he tendered in evidence a letter dated the 11th of April 1855, purporting to be signed by the plaintiff's father, which letter, if genuine, goes far to prove the defendant's case. The Subordinate Judge refused to receive this document in evidence, because it was not stamped: and as a consequence of his so refusing, the question whether it is or is not a genuine letter of the father has not been gone into as it should have been.

It is perfectly clear that the Subordinate Judge was wrong in supposing this letter must be treated as either a bond or a sharakutnamah, and required a stamp. It is a simple letter from the plaintiff's father, and needs no stamp.

It is absurd to say that it requires a stamp merely because it contains an admission that the father was entitled only to a twelve-anna share of what was due from the Rajah of Durbhanga. This letter is not only most important in itself if proved to be really a letter written by the plaintiff's father, but it has very important bearing on the question of the genuineness of the other documents, *e.g.*, the receipt dated November 4th, 1863, the letters dated Assar 6th, 1920 Sumbat, the 27th Assin 1920, and the 5th Assar 1279, &c., of which the Subordinate Judge says that they seem "all fabricated and false *when there is no primary evidence on the subject of partnership in support, &c.*"

We indicate no opinion one way or other as to whether these papers or any of them are forgeries or not. We merely say that the letter of April 11th, 1855, should not have been excluded simply because unstamped; that the parties must have an opportunity of going into evidence as to it; and that if it should be found to be genuine, that fact will have a most important bearing on the question of the genuineness of the other documents, which question must consequently be, in that case, reconsidered.

One important issue in these suits is as to what Ram Churn Lall's real position was,—the extent to which he interfered in the management of the plaintiff's affairs,—and how far his acts and admissions are binding upon the plaintiff, or can be used as evidence against him. This question arises with reference to the letters of 6th Assar 1920 Sumbut (spoken of by the Subordinate Judge as No. 4, and marked D 38) and other documents. It also is of vital importance with reference to the various khokas, or paid hundis, for the amounts of which Monohur Doss claims credit. It may be that Ram Lall did draw, and had authority to draw, these hundis on behalf of the plaintiff. If so, Monohur Doss is entitled to credit for the payments he made in respect of them. The issues, whether he did so draw the hundis, and whether he had authority to do so, must be properly tried and distinctly decided. As Monohur Doss claims credit for the payments made on the hundis drawn by Ram Churn Lall, it is for him to prove that they were drawn and paid under such circumstances as to bind the plaintiff.

Then the issue raised as to the rents collected by Monohur Doss must be retried.

The defence is that the plaintiff's guardian, Mussamut Baroo, gave a pottah to Bolakee Chand, at an annual jumma of Rs. 300, and that Monohur Doss received five years' rent at that rate, *i.e.*, Rs. 1,500, and no more. The issue seems sufficiently simple: but the Subordinate Judge has so confused it with questions about what he terms primary and secondary evidence, that it is wholly impossible to say that it has been really tried at all. The pottah (No. 60) and the letter (No. 52) are undoubtedly important items of evidence if they are found to be that which they respectively purport to be. The Court must decide whether they are genuine, and deal with them accordingly.

The Court must look at the whole evidence before it (whether primary or secondary), and must find distinctly whether Monohur Doss made the collections as alleged by the plaintiff. The *onus* of proving that the collections were what he claims lies on the plaintiff.

The account (D 35, or No. 50), said to be in the plaintiff's handwriting, must be duly

Digitized by Google

considered, and its proper weight must be given to it. Is it in fact written by the plaintiff? If so, when was it written by him, and why? How did it get into Monohur Doss's hands, and what is its effect, and how far does it aid in arriving at a conclusion one way or other on the questions at issue between the parties?

The following are the matters on which we remand these suits, and direct a new trial.

As to the monies received from Court in the suit against Mr. Forlong as manager for the Rajah of Durbhanga, the question is whether the plaintiff is entitled to more than a 12-anna share of the monies received under this head. There is no dispute as to the fact of the monies having been drawn from the Court.

2. As to the khokas, for the payments in respect of which Monohur Doss claims credit, the question is whether these payments were made on account of the plaintiff? If so made, are they payments in respect of which Monohur Doss is now entitled to credit?

3. As to the collections from the lands, the question is what amount did Monohur Doss in fact collect, or ought he to have collected? And is he responsible for any thing (and for how much) which he ought to have collected but failed to collect?

It seems to us that the Court ought to have Monohur Doss personally before it, and to examine him fully and closely upon all these points as to which we are now remanding these suits. On some questions, possibly the evidence of the plaintiff would be useful. But to be useful, the examination of these persons, as also of all other witnesses, must be intelligent and searching, and not merely formal.

The parties are to be at liberty to go into evidence anew as to these questions, of which we now direct a retrial.

We proceed to the appeals Nos. 11 and 12 of 1874, in which Situl Pershad, the plaintiff in the Court below, complains of the decision that he is entitled to interest only from the date of demand, and not from the dates on which the various sums were received by the defendant.

The question of interest in suits like this depends on whether the agent's conduct has been fraudulent or not. In the absence of fraud, it is simply a case of an agent retaining money which he ought to pay over, but which he has not been required to pay: and if it be simply such a case, the agent would not ordinarily be made to pay interest. On the other hand, if the agent's conduct has been fraudulent, he ought to be charged with interest on all monies improperly retained by him. The Court must decide whether the agent's conduct has been fraudulent. If it finds that the letter of the 11th April 1855 and other documents are forgeries, there will be very substantial grounds for concluding that his conduct has been fraudulent. But the mere fact of his not having made the payments when he ought, is not of itself evidence of fraud.

The cases are remanded, and are to be dealt with in the manner indicated. The costs of the remand will follow the result.

(See Turner v. Burkinshaw, 2 L. R. Chancery, page 488.)

The 8th March 1875.

Present:

The Hon'ble W. Markby and G. G. Morris, *Judges.*

Act IX of 1871—*Limitation—Bona fides—Execution Proceedings—Application—Notice.*

Case No. 520 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Chittagong, dated the 21st September 1874, *reversing an order of the Moonsiff of Raojan, dated the 2nd July* 1874.

Shurut Chunder Sen (Decree holder, Petitioner) *Appellant,*

versus

Abdool Khyr Mahomed Mohutesur Billah (Opposite Party) *Respondent.*

Baboo Aukhil Chunder Sen for Appellant.

Moonshee Serajul Islam for Respondent.

No question of *bona fides* arises under the present Limitation Act (IX of 1871) as to proceedings taken in execution of a decree.

An application which is pending must be looked upon as a continuous proceeding until it is disposed of.

Digitized by Google

When a notice is issued, a new period of limitation begins to run.

Markby, J.—In this case a good deal of the judgment of the District Judge of Chittagong turns upon the consideration of whether the proceedings taken by the decree-holder were *bonâ fide* proceedings as they have been called. It is now settled that no question of that kind arises under the present Limitation Act. The only ground upon which the judgment of the Lower Court could be supported is that there was between the 3rd December 1859 and the 5th December 1862, a period of more than three years. Now even supposing that the District Judge was justified, having regard to all that has taken place since that time, in calling upon the decree-holder to explain that delay, still we think that in this case it has been explained. According to the Privy Council decision in the XIV Weekly Reporter, page 22, the application of the 3rd December 1859 having been pending until some day in January 1860, it must be looked upon as a continuous proceeding upon every day from the time of the application when it was presented until it was disposed of. Therefore that gap is reduced to a less period than three years. Of course this question must be decided by the law as it then stood, and the application of the 5th December 1862 was not barred as having been made after three years had elapsed.

Then a cross-objection is taken that more than three years have elapsed between the 29th January 1870, when the last application was made, and the 12th July 1873, when the present application was made. That is a matter to be decided under the new Act. But it now appears upon further investigation that a notice was issued on the 1st July 1870. That is one of the dates from which the Act declares that a new period of limitation begins to run. A further application for execution was made on the 21st June 1873, and that according to the new Act would give a fresh starting point for the period of limitation. And the present application, therefore, made immediately after that, will be within time.

Under these circumstances, therefore, it appears to us that these proceedings are not barred by limitation, and that execution must proceed subject to any objection which the parties may have made and which is not yet disposed of.

The appellant will get the costs of this appeal.

The 8th March 1875.

Present:

The Hon'ble W. Markby and G. G. Morris, *Judges.*

Registration Act—Appeal.

Case No. 342 of 1874.

Miscellaneous Appeal from an order passed by the Officiating Judge of Rajshahye, dated the 6th May 1874, *affirming an order of the Sudder Moonsiff of that district, dated the 5th May* 1873.

Radha Kristo Dutt and others (Judgment-debtors) *Appellants,*

versus

Gunga Narain Chatterjee (Decree-holder) *Respondent.*

Baboo Kishoree Mohun Roy for Appellants.

Baboo Bhyrub Chunder Banerjee for Respondent.

The Indian Registration Act (VIII of 1871) takes away an appeal in proceedings in execution, as well as in proceedings upon which a decree is made.

Markby, J.—We do not think it necessary to hear the other side. This very question was before the Court, and was decided in the case reported in the XVIII Weekly Reporter, page 512. It is there said generally that the appeal is taken away in proceedings in execution, as well as in proceedings upon which decree is made. We see no reason to differ from that decision.

The appeal is dismissed with costs.

Digitized by Google

The 24th August 1874.

Present :

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Purchase—Lite Pendente—Impugning the Bona fides of a Decree—Onus Probandi.

Case No. 535 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Dacca, dated the 26th August 1873, *affirming a decision of the Subordinate Judge of that district, dated the 29th June* 1871.

Rubia Khanum and others (Plaintiffs) *Appellants,*

versus

Mr. J. P. Wise (Defendant) *Respondent.*

Baboos Mohinee Mohun Roy and *Nullit Chunder Sen* for Appellants.

Mr. C. Gregory and *Baboo Kalee Mohun Doss* for Respondent.

A party purchasing the right title and interest of another during the pendency of a suit against that other, is bound by the judgment in that suit.

Where a decree in execution of which formal possession has been obtained, is impugned by the party in actual possession as fraudulent and collusive, the *onus* lies on the impugners to prove their allegation.

Jackson, J.—We regret extremely that we are not in a position to affirm the judgment of the Lower Appellate Court in this case. The suit was brought by plaintiffs against Mr. J. P. Wise to recover possession of one-fourth share of a kharija talook. The suit was in the first place dismissed by the Subordinate Judge. On appeal, the District Judge reversed that judgment and gave plaintiffs a decree. On appeal to the High Court the judgment was set aside, and the suit was remanded to the District Court for further trial. The result of that further trial is that the District Judge has now affirmed the original decision of the Subordinate Judge, and on application for review has refused to disturb his decision so arrived at. In special appeal the plaintiffs abandoned a part of their claim in respect of which they found they could not prove possession within twelve years, but as to the remainder 2 annas they contend that on the evidence they were entitled to judgment, and we think they have made out their possession. Their right to that share of 2 annas is based upon a decree which they recovered against Gureeb Hossein Chowdhry in 1862 of which decree execution was obtained in 1864, and formal possession was given by the Court. The defendant, Mr. Wise, claims that same share under purchase by him in other execution proceedings of the right title and interest of the said Chowdhry in July 1862. In respect of the plea of limitation, the plaintiffs contend, and in our judgment correctly, that on the authority of various rulings of this Court, the formal possession given them in the execution proceedings of 1862, gave them a fresh start of cause of action, and their suit commenced in 1870 was therefore within time. The most recent case decided is the decision of the Judicial Committee in what is known as the Mundul's case in XIX Weekly Reporter, page 101. The plea of limitation being thus disposed of, the question is whether the defendant is not so bound by that decree as to entitle plaintiffs to a judgment. It appears to us that he is. The decree in question is impugned by the defendant as being a fraudulent and colorable decree, but his vakeel who, we are bound to say, was not as well acquainted with the facts of the case as his duty towards his client required, was unable to suggest that there was any evidence to support that assertion. That there was no such evidence, we think, we may infer from the judgments of the two Courts below. What Mr. Garrett says in his judgment in review on this part of the case is this :—

"The vakeel's argument is that his cause "of action is from the date on which he "was prevented from assuming the possession granted to him by the proclamation "(which is probably true) that he has recovered judgment of Court, and under that "judgment was actually proclaimed to be in

Digitized by Google

"possession less than twelve years before the "institution of this case, and that under "such circumstances he must be entitled to "recover possession. I would remark that "this only remits us to the question which "lies at the bottom of the suit. Was this "mortgage by Ramzoo (as well as the other "proceedings taken to evidence Ramzoo's "title and possession) and the decree with "Gureeb Hossein suffered thereupon a *bonâ* "*fide* proceeding? or was it a mere color-"able transaction arranged beforehand by "Gureeb Hossein on the family to recover "part of the property in case of accidents? "As I held in my late judgment, and I see "no reason to doubt, the *onus* of proving "this lies on the plaintiff under the particu-"lar circumstances of the case, and for the "reasons stated in my former judgment, this "duty he has not in my opinion discharged." Therefore the defendant, it seems, at least we are entitled so to assume, gave no evidence, and we think there was no circumstance which threw upon plaintiffs the burden of proving that the judgment apparently good and valid which he obtained in 1862 was otherwise than a fair *bonâ fide* judgment. It was said by the respondent's pleader that this was part of a series of transactions originating in some fraud of Mahomed Jukee Chowdhry, the father of Gureeb Hossein, who had been adjudicated liable to satisfy various execution debts out of his property, and the property was declared liable for that purpose, notwithstanding several alienations and transfers by the Chowdhry. That may be perfectly true, but the plaintiffs are entitled to stand upon their judgment, unless that judgment has been impugned and shown to be collusive or *malâ fide*. We cannot take the general sweeping statement made by the Subordinate Judge, nor the mistaken position as to the *onus* of proof laid down by the District Judge, as freeing the defendant from his liability to be bound by that judgment. Inasmuch as the defendant claims in this case only as representative by purchase of the right title and interest of Gureeb Hossein, and as that purchase was made during the pendency of a suit in which the present plaintiffs put in their claim against the said Gureeb Hossein, we think he is bound by the judgment given in that suit, and that the plaintiffs are therefore entitled to recover a 2 annas share. To that extent the judgment of the Lower Appellate Court is set aside, and the suit decreed with costs in proportion.

The 26th January 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Act XL of 1858 ss. 9 to 12—Certificate to Hindoo Widows.

Case No. 450 of 1874.

Miscellaneous Appeal from an order passed by the Officiating Judge of the 24-Pergunnahs, dated the 28th September 1874.

Nistarinee Debee (Petitioner) *Appellant,*

versus

The Collector of the 24-Pergunnahs and others (Opposite Party) *Respondents.*

Mr. C. Jackson and *Baboo Mohinee Mohun Roy* for Appellant.

Baboo Unnoda Pershad Banerjee for Respondents.

Where a certificate under Act XL of 1858, which had been granted to the two widows of a deceased Hindoo, was recalled, simply because in consequence of their disagreement joint management had become impossible, and the District Judge refusing the application of the widow, who was the minor's mother, to be made sole manager, directed the Collector under s. 12 to take charge:

HELD that, in the absence of any ground to remove her summarily, the Court was bound to grant the application of the minor's mother as the nearest relative, and to allow her the management until some cause to remove her was duly made out.

Jackson, J.—THE appeal before us relates to the estate of one Nunee Gopal Roy Chowdhry, son of one Kalee Kant Roy Chowdhry, deceased. It appears that, on the death of the father, a certificate was granted by the Court, under the provisions of Act XL of 1858, to the two widows, Kisto Mouee and Nistarinee, of whom Nistarinee was the mother of the infant. For some time the two ladies carried on the management of this property together, but they have now fallen out, and are not willing to continue in the joint management, and according to the Judge, in September, Nistarinee, the infant's

Digitized by Google

mother, applied to the Court to be made the sole manager. On that the Judge says:—"I am of opinion that the Collector is the "proper person to manage the minor's estate, "which consists in a great measure of land, "although it is not an undivided estate. It "was not to be expected that the widows "would continue to manage it without fall-"ing out, and as they have both expressed "their unwillingness that the present joint "management should continue, and as I "decline to put the property entirely into the "hands of Nistarinee Debee, I direct under "Section 12 Act XL of 1858 that the Col-"lector take charge of the estate." It has been held by a Division Bench of this Court that the powers given by Sections 10, 11, and 12 of that Act only accrue on the happening of the contingencies mentioned in Section 9, that is, if no title to a certificate is established to the satisfaction of the Court by a person claiming under a will or deed, and *if there be no near relative willing and fit to be entrusted with the charge of the property of the minor.* In the present case we have the widow—the mother of the minor—willing, and as far as we know, and there appears nothing to the contrary, fit to take charge of the property. The certificate granted to the two widows together was not recalled by reason of any waste or misconduct on their part, but simply because in consequence of their disagreement joint management had become impossible. In that state of things, the case reverted to a condition in which it would have been if this had been an application made for the first time on the death of the husband. At that time probably, if the two widows had not made a joint application, the Court would have been bound to grant the certificate to Nistarinee alone on her application. In the absence of any ground to remove her summarily in the manner laid down by the Full Bench in the case of Nunnee Bibee *v.* Khajah Surwar Hossein and others in 7 Weekly Reporter, page 523, the Court would be bound to grant the certificate to the mother as the nearest relative, and to allow her the conduct of the management until some cause to remove her is duly made out. The Collector appears before us to-day by the senior Government pleader, and he very fairly and reasonably says that although quite willing to accept the charge offered to be put on him, he is not interested in opposing the mother's claim. In these circumstances, the order of the Lower Court is set aside. We make no order as to costs.

The 3rd February 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Limitation — Adverse Possession — Lessor and Lessee.

Case No. 1262 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Dacca, dated the 2nd March 1874, *reversing a decision of the Subordinate Judge of Furreedpore, dated the 30th September* 1871.

Dhun Monee Chowdhrain (Plaintiff) *Appellant,*

versus

Golam Kasom and others (Defendants) *Respondents.*

Baboos Mohinee Mohun Roy and *Issur Chunder Chuckerbutty* for Appellant.

Baboo Mohesh Chunder Chowdhry and *Mr. M. L. Sandel* for Respondents.

In a suit for possession against a mirasdar, who pleaded limitation, the Judge was held to have been in error in adding to the time for which the defendant had been holding under the miras lease the period of possession by the lessor, because the one is not in continuation of the other; the holding of the proprietor being quite a different thing from the holding of the lessee.

Jackson, J.—We consider that as to the land held by the defendant, mirasdar, under the pottah dated 1265, which pottah was dated more than twelve years before the commencement of the suit, the suit is barred by limitation, and the plaintiff can only claim to receive rent from the mirasdar in respect of that land. It is not shown that the plaintiff

Digitized by Google

was under any mistake as to the nature of the defendant's holding of that land, and we may assume, we think, that he had notice of it from the commencement. As to the subsequent pottahs, we think that the District Judge was in error in adding to the period for which the land had been held under those pottahs the time of adverse possession by the lessor. The Judge says :—"I think, therefore, that I must find that as against Nuzuff, "the appellant mirasdar has by himself and "by his lessor been in adverse possession, or "more strictly that Nuzuff has not been in "possession within the twelve years next "before the commencement of the suit, and "therefore the respondent's claim is barred." Now, as to Nuzuff there was conclusive decision as between him and Ali Hossein as to the proprietary interest in this land, and we think that the Judge could not add to the time for which the defendant had been holding under the miras lease the period of possession by the lessor, because the one is not in continuation of the other. The holding of the proprietor is a quite different thing from the holding of the lessee. The plaintiff has a decree which has become final, and which quite suffices for all purposes as between him and Golam Nuzuff, and so does the possession under Section 230 suffice as between him and Ali Hossein. As to the present defendant, the plaintiff's cause of action against him only arises from the time of the execution of the leases, and certainly the plaintiff could have no notice before the lease was created. The plaintiff, therefore, cannot be held to be barred in respect of those leases of 1267 and 1269. As the decision of the Lower Appellate Court stands, the case appears to have been decided only on the question of limitation, and no other questions have been gone into. The case, therefore, must go back in order that those questions may be determined. It remains to be observed that the Judge on this second occasion disposed of finally the question of limitation under the miras lease, and having decided this he says :—"The "appeal will therefore be decreed with all "costs and interest at 5 per cent. till the "date of realization." And on referring to the record it appears that the decree of the Appellate Court is also in those words. There are other questions which remain to be disposed of, *viz.*, touching the land not comprised in this miras lease. The Judge ought to have disposed of those and come to separate findings in respect of them. He should take care to do so now.

The 24th February 1875.

Present :

The Hon'ble Louis S. Jackson and W. MeDonell, *Judges.*

Suit for Ejectment—Issues—Findings by A late Court.

Case No. 1527 of 1874.

Special Appeal from a decision passe the 3rd Subordinate Judge of 24-gunnahs, dated the 18th April affirming a decision of the 3rd M siff of Alipore, dated the 31st Dece 1873.

E. Mackintosh (Plaintiff) *Appellant*

versus

Lall Chand Malee (Defendant) *Respond*

Messrs. C. Jackson and *J. S. Rockfo* for Appellant.

Baboos Mohinee Mohun Roy and *Kalee Mookerjee* for Respondent.

In a suit for ejectment where defendant pleade session under a pottah granted to him upon the l a mowroosee mokururee pottah, and the Moonsiff co ing that the pottah had not been proved, never found that the tenant had acquired a right of occ by holding as a tenant more than twelve yea dismissed the suit :

HELD that the Subordinate Judge, upon the pla appeal, ought not to have gone beyond the judgm the first Court, and added a superfluous finding as genuineness of the pottah.

Jackson, J.—THE plaintiff brough suit out of which this appeal arises to re possession of 20 beegahs of land being of 38 beegahs purchased by plaintiff Mr. Cooke, the 20 beegahs being i possession of the defendant and held by after notice to quit served by the pla The defendant's answer was that he an father before him had held the land for a space of time, *viz.*, for more than t years, and that consequently he could n ejected. He further alleged that the of the father to hold the land was upon a mowroosee mokururee pottah w had been lost, whereupon the owner Habberly granted him a new pottah the 9th Assin 1266 under which he cla to hold the land in spite of the plain notice. The suit was tried by the

Digitized by Google

Moonsiff of Alipore, who, after considering the evidence, came to the conclusion that the pottah set up by the defendant had not been proved, but he found at the same time that the defendant had held the land as a tenant and cultivator for more than twelve years. The plaintiff's case upon this point was that the defendant's occupation, or that of his father, was that of a servant, and not of a tenant. But this view was not adopted by the Moonsiff. He held that the defendant had acquired a right of occupancy, and on that ground he dismissed the suit. The plaintiff appealed, and the appeal was heard by Baboo Mannoo Lall Chatterjee, then acting as Subordinate Judge of 24-Pergunnahs. That officer in a very lengthy judgment considered the genuineness of the pottah set up by the defendant, and although his conclusion is not declared—taking it altogether—in very decided terms, he appears to have been of opinion that the pottah was proved, but he says "whether the title set up "by defendant is proved or not, if he can "prove a right of occupancy, it will be a "sufficient answer to the suit of plaintiff." He then goes into that point, and finding that the defendant had that right of occupancy, he dismisses the appeal in confirmation of the Moonsiff's order.

Now, this matter having been argued before us in special appeal, we have come to the conclusion that, if the Subordinate Judge had contented himself after consideration of the evidence with simply affirming the judgment of the Moonsiff, we should have had no ground to interfere with that decision in special appeal. But the Subordinate Judge has gone further and has recorded an opinion, which, though not very positively expressed, is yet likely to be prejudicial to the plaintiff in respect of the authenticity of the defendant's pottah. We have often had occasion to observe upon what we may call the levity with which rights of this description are occasionally disposed of in the subordinate Courts. An absolute right to hold land at an invariable uniform rent for ever is sometimes found decreed as if the claim was for a trifling sum of money. The circumstances under which this pottah came into Court were certainly very suspicious. The witness Cooke who sold to the plaintiff deposed (and there is no reason to question the truth of what he said) that, on coming into possession and enjoyment of the land, he called upon the defendant to produce the pottah, but that the defendant did not produce it. It has been suggested that this pottah was the subject of adjudication, at least that it was submitted to Court in a previous suit, but there is nothing on the pottah making it as if it had been so produced in Court at any time. The pottah itself bears considerable internal evidence of not being a genuine deed. It is written in a language and with an orthography which would be discreditable to any person having the smallest claim to education. The signature of the grantor—even putting aside the question of evidence as to its genuineness—has the appearance of having been written upon a paper upon which something else had previously been written. There is no subscribing witness to it. The person whose name appears on the document as the writer has not been called, and his non-appearance is in our judgment not sufficiently accounted for. The defendant indeed says that he made search for him, and he believes he is dead, but considering that this defendant and his father had held so many years under Mr. Habberly, and that the supposed writer is described as being Mr. Habberly's sircar, a mere statement of that sort is not sufficient. We mention these facts in connection with the document for the purpose of showing that if it were necessary, and if we were dealing with the case as one of regular appeal, we should undoubtedly have set aside the judgment of the Subordinate Judge upon the question of fact. But the case is not before us for that purpose, and it is sufficient for us to say, what we are entitled to say, that in the circumstances of the case, looking at the insufficient proof set up by the defendant in respect of the pottah, the Subordinate Judge ought not to have gone upon the appeal of the plaintiff beyond the judgment of the Court below, and added to the judgment of that Court a superfluous finding upon the question of the genuineness of the document. The ground upon which the Moonsiff had based his judgment was quite sufficient for throwing out the suit. We do not think that in addition to that, the plaintiff should find himself hampered with an unnecessary finding as to the genuineness of the pottah. We, therefore, so far amend the judgment of the Lower Appellate Court as to reduce it to a simple confirmation of the judgment of the Moonsiff throwing out the plaintiff's suit on the ground that the defendant had a right of occupancy. Considering the circumstances of the case, and our opinion in regard to the case set up by the defendant, we think each party in this case should pay his own costs of the proceedings.

Digitized by Google

The 6th March 1875.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Illegitimate Sons of Soodras — Inheritance — Hindoo Law (Mitakshara)—Marriage—Presumption of Validity.

Case No. 737 of 1874.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 30th December 1873, *affirming a decision of the Moonsiff of Tumlook, dated the 19th September* 1873.

Narain Dhara (Plaintiff) *Appellant,*

versus

Rakhal Gaen, guardian of Jonardun, minor son of Narainee (Defendant) *Respondent.*

Baboo Doorga Mohun Doss for Appellant.

Baboo Bhoobun Mohun Doss for Respondent.

According to the doctrines of the Bengal school of Hindoo law, all illegitimate sons of a Soodra do not inherit their father's property; but only a certain description of such sons, *viz.*, those begotten by a man of the servile class on his female slave.

In the Soodra caste, illegitimate children *may* inherit *in certain cases* and have a right to maintenance *in all cases:*

HELD by Mitter, J. (Markby, J., *dubitante*) that the presumption from cohabitation which arises in favor of the validity of a marriage, is excluded where the alleged wife is of a different caste from the husband; and unless sanctioned by custom, such a marriage is not legally binding.

Mitter, J.—IT is admitted on both sides that the property in dispute belonged to one Radhoo. The plaintiff, who is his brother, seeks to recover possession of it as his heir.

The defendant resists the claim alleging that she is the widow of the deceased, and her minor son by the deceased Radhoo is under the Hindoo law preferential heir. Radhoo was of the *Koibarto* caste, and the defendant is of the *Tantee* caste. The third paragraph of the written statement which contains all the material allegations upon which the defence rests is to the following effect:—

"Although originally the aforesaid Radhoo "was a separate brother of the plaintiff, yet "he forsaking his own caste remarried me "who is of the *Tantee* caste, according to "the custom of the *Tantee* caste. Thus "being united as husband and wife, we were "living together for at least twenty years, "and my son born of his loins performed the "funeral rites of the deceased Radhoo and "bore tokens of impurity according to the "usage of his own caste. The plaintiff did "not either bear the tokens of impurity or "perform his shrad."

From the foregoing statement, it is clear that the defendant put the legality of her marriage, and consequently the legitimacy of her son, upon a social custom obtaining amongst her caste people.

The Moonsiff held that the validity of the marriage was not established, but he, being of opinion that an illegitimate son of a Soodra was a preferential heir to a brother, dismissed the plaintiff's suit. The District Judge on appeal has upheld that decree, both on this ground and also upon the ground that the marriage in this case between the defendant and the deceased should be presumed, it having been shown that they lived as husband and wife for at least twenty years.

The contention raised in special appeal is that the decision of the Lower Court both on the question of the validity of the marriage and the heritable rights of an illegitimate son of a Soodra is erroneous in law, and I am of opinion that this contention is valid.

After having expressed his opinion that an illegitimate son of a Soodra under the Hindoo law inherits his putative father's property, the District Judge, with reference to the question of marriage, says:—"That "more than this I am not at all sure that the "son is illegitimate, the defendant lived as "his wife with Radhoo for twenty years and "still asserts that she was married to him. "The marriage, therefore, may, I think, be "presumed, and the disproof of it lies upon "the plaintiff. I cannot say that he has "succeeded in disproving it."

In an ordinary case where it is established that parties have lived together as husband

Digitized by Google

and wife for a long length of time, it is consonant with natural justice to presume a valid marriage between them ; and I am not aware of any peculiar provision in the Hindoo law, which is inconsistent with such a presumption as this. But in this case there is no room for it, for the parties are of different castes, and a valid marriage between them is impossible, unless sanctioned by any peculiar social custom governing them (see Vyavastha Durpana, page 1038, and Ward's Account of the Hindoos, Volume I, page 94). It is for this reason we find that the defendant in her written statement alleges that the marriage between her and the deceased Radhoo was valid by the usage obtaining amongst her caste people. Of this custom she has given no evidence, and it is possible that the attention of the parties was not called to this matter on account of the form in which the issue regarding legitimacy of the defendant's son has been framed. But it is clear that upon the materials upon the record, the Lower Appellate Court having regard to the particular facts of this case was legally not warranted in making any presumption in favor of the validity of the alleged marriage between the defendant and the deceased Radhoo. Therefore, the judgment of the District Judge upon this matter is erroneous in law.

The next question we have to consider in this case is whether or not an illegitimate son of a Soodra can succeed to the property of his putative father. The Lower Courts have relied upon a decision of the Judicial Committee of the Privy Council* quoted in Cowell's Lectures, page 202, in support of their view. It is also reported in page 1 of III B. L. R., P. C. It is a Madras case ; and before discussing whether it is applicable or not, it will be better to examine the authorities of the Bengal school of the Hindoo law, bearing upon the question before us.

In the Dyabhaga, the leading authority of the Bengal school, the passage which is supposed to favor the contention of the illegitimate son is to be found in verse 29 of Chapter IX. This Chapter deals with the subject of the participation of sons by women of various tribes ; and verse 2 clearly shows that they are not illegitimate sons, but legitimate issues of married wives of various tribes, the shasters in ancient times legalising intermarriage. But in the present age the provisions relating to intermarriage are not extant, but have become obsolete. Therefore it is questionable whether the provisions of that Chapter are binding now (see note, page 14, Vyavastha Durpana.) But passing over that objection, let us see how far the passage quoted supports the view of the law taken by the Courts below. The verse 29, as translated by Mr. Colebrooke, runs thus :—"But the son of a "Soodra by a female slave or other unmarried "Soodra woman, may share equally with other "sons, by consent of the father. Thus "Menu says :—'A son, begotten by a man of "the servile class on his female slave, or on "the female slave of his slave, may take a "share of the heritage, if permitted : thus "is the law established.'" The passage as translated certainly warrants the conclusion that an illegitimate son of a Soodra by a slave or other unmarried Soodra woman takes the inheritance of the father. But referring to the original text, I find that there is a slight inaccuracy of translation in the first part of the verse in question. The passage if correctly rendered would run thus :—"But the "son of a Soodra by an unmarried female "slave, &c., may share equally with other "sons, by consent of the father, &c." There is a similar inaccuracy in verse 31, which should stand thus :—"Having no other "brother begotten on a married woman (he) "may take the whole property : provided "there be not a daughter's son. So "Yajnyawalkeya ordains :—'One, who has "no brother, may inherit the whole property ; "for want of daughter's sons. But if there "be a daughter's son, he shall share equally "with him : for no special provision occurs : "and it is fit, that the allotment should be "equal ; since the one, though born of an "unmarried woman, is son of the owner ; and "the other, though sprung from a married "woman, is only his daughter's son.'"

These passages as corrected will appear to accord with the quotation from Menu's in verse 29, which has been cited as their authority, but as they stood before they would seem to go much further than the text of Menu warranted. Therefore, it is evident from these verses, if we read them correctly, that they do not lay down that all illegitimate sons of Soodras inherit their father's property, but only a particular class, *viz.*, those "begotten by a man of the "servile class on his female slave or on the "female slave of his slave."

In Mitakshara, Chapter 1, Section XII, there occur the following passages :—

1. "The author next delivers a special

* 12 W. R., P. C., 41.

Digitized by Google

"rule concerning the partition of a Soodra's "goods. Even a son, begotten by a Soodra "on a female slave, may take a share by the "father's choice. But, if the father be "dead, the brethren should make him "partaker of the moiety of a share: and "one, who has no brothers, may inherit the "whole property, in default of daughter's "sons."

2. "The son, begotten by a Soodra on a "female slave, obtains a share by the father's "choice, or at his pleasure. But after (the "demise of) the father, if there be sons of "a wedded wife, let those brothers allow "the son of the female slave to participate "for half a share: that is, let them give "him half (as much as is the amount of "one brother's) allotment. However, should "there be no sons of a wedded wife, the "son of the female slave takes the whole "estate, provided there be no daughters of "a wife, nor sons of daughters. But, if "there be such, the son of the female slave "participates for half a share only."

3. "From the mention of a Soodra in "this place (it follows that), the son begotten "by a man of a regenerate tribe on a female "slave, does not obtain a share even by the "father's choice, nor the whole estate after "his demise. But, if he be docile, he "receives a simple maintenance."

The same rule of law is to be found in the Duttaka Chundrika, Section 5, v. 30, and the 3rd volume of Colebrooke's Digest, Clause XXIV, page 143 (the aforesaid inaccuracy of translation, as has been pointed out before, also occurs in page 143 of Colebrooke's Digest).

From all these texts of the Hindoo law, it is evident that so far as the districts governed by the Bengal school of the Hindoo law are concerned, the Lower Courts are not correct in laying down broadly that all illegitimate sons of Soodras succeed to the inheritance of their father. Sir W. Macnaughten also takes the same view of the law. In his treatise on Hindoo laws, page 18, he says:—"Among the sons of the "Soodra tribe, an illegitimate son by a slave "girl takes with his legitimate brother a "half share; and where there are no sons "(including son's sons and grandsons), but "only the son of a daughter, he is consi-"dered as the co-heir and takes an equal "share."

In a note in page 15 of the second volume of the same work, he observes:—"Accord-"ing to the Hindoo law the illegitimate "son of a Soodra man by a female slave, or "a female slave of his slave, may inherit, "but not the illegitimate child of any of "the three superior classes. It appears in "this case that the parties are Soodras; but "it is not distinctly stated whether the "eldest brother died previously or subse-"quently to the death of any or all of his "other three brothers, or whether the woman "on whom the plaintiff was begotten by "him was one of the fifteen descriptions of "slaves, or was merely a concubine. If "the woman were his slave, and the other "three brothers died before the eldest, then "the son begotten by him on the female "slave would be entitled to the entire pro-"perty. On the other hand, if one or more "of the brothers died subsequently to the "death of the eldest brother, the illegitimate "son would be entitled to claim only such "portion as belonged to his putative father, "there being no law admitting the son of "a Soodra by a female slave to share the "estate of the collaterals. If the woman "were not his female slave, the son begotten "on her by him would have no right to the "inheritance, but only a claim to maintenance; "and under no circumstances could the son "of the sister begotten as above have any "right to succeed to his mother's brothers."

From an examination of these authorities, it is clear that, according to the doctrines of the Bengal school of the Hindoo law, a certain description of illegitimate sons of a Soodra by an unmarried Soodra woman is entitled to inherit to their father's property in the absence of legitimate issues. It has never been contended, far from being established in this case, that the minor son of Radhoo, whose right has been set up by the defendant in answer to the plaintiff's claim, falls within that class. Consequently that son is not entitled to inherit to Radhoo's property, and he being put out of the way, the plaintiff's right is clearly established. Therefore, the decisions of the Lower Courts are opposed to the provisions of the Hindoo law.

We have next to determine whether the conclusion at which the Courts below have arrived can be supported upon the authority of the decision of the Judicial Committee of the Privy Council quoted by them.

Two questions were at issue in that case, *viz.*, 1st, "whether there was a marriage in fact; and secondly, if there was a marriage in fact, then whether there was a marriage in law." Upon the evidence the first question was decided in the affirmative. "Then if there was a marriage in fact,"

Digitized by Google

their Lordships observe, "was there a marriage in law." When once you get to this, *viz.*, that there was a marriage in fact, there would be a presumption in favor of there being a marriage in law.

Having made this presumption, their Lordships proceed to examine the grounds upon which it was contended that, notwithstanding that presumption, the marriage was *invalid* in law. The ground upon which this contention was founded was that the father of the mother of the plaintiff in that case was illegitimate, therefore the child of that father being an *outcaste* could not contract a valid marriage. After observing that there is no authority to support any such proposition as that which is contended for, they further observe:—"Though their Lordships do not agree in every thing that has been stated in the Court of appeal, they are satisfied that in the Soodra caste illegitimate children may inherit and have a right to maintenance." They, therefore, clearly do not entirely endorse the view taken by the High Court of Madras in that case. The decision of the Madras High Court in that case is reported in page 478, Madras Reports, Volume I, and referring to that judgment it appears that that Court held that the son of a Soodra and of a woman between whom there has been no formal ceremony of marriage inherits his putative father's property. Their Lordships expressly say that they do not wholly concur with the Madras High Court in laying down this as a correct proposition of law; but they say that in the Soodra caste illegitimate children *may* inherit and *have* a right to maintenance, *i.e.*, may inherit *in certain cases*, and have a right to maintenance *in all cases*. Such a proposition as this is clearly consonant with the authorities we have been examining in this case, and the effect of that observation in that particular case before their Lordships was to show that the argument of the party contending against the validity of the marriage was based upon the assumption that an illegitimate child is necessarily an outcaste—an assumption not true in all cases. It appears to me, therefore, that the decision quoted by the Lower Courts, far from supporting their conclusion, goes in a great way to show that an illegitimate child does not necessarily in all cases possess heritable rights even amongst the Soodras.

For these reasons, I think that the decision of the Lower Courts upon the materials now upon the record cannot stand. But from the nature of the issues laid down in the Moonsiff's Court, it appears to me that the question of custom which was distinctly raised in the defendant's written statement, and in fact upon which the defendant's case was solely made to rest, was wholly lost sight of in both the Courts below. It is possible, therefore, that in respect of this particular matter of the defendant's defence, she having been misled by the form of the issue, has been precluded from adducing any evidence in support of it. Upon this ground, I am inclined to give her an opportunity of establishing her defence, if she can. I would, therefore, remand the case for the adjudication of this issue, *viz.*, whether by any usage or custom prevailing amongst the caste people of the defendant, there could be any valid marriage between her and Radhoo. Costs to follow the result.

Markby, J.—I entirely concur with my learned colleague in thinking that the Lower Courts are wrong in laying down broadly and without restriction that the illegitimate sons of a Soodra can succeed to the inheritance of their father; I concur with him in thinking that the illegitimate sons of a Soodra can only succeed to their father's estate in certain cases, and that in this case if the son of Radhoo be illegitimate he will not succeed.

The only doubt I have is as to the reasons given by my learned colleague for holding that the District Judge is wrong in presuming that there was in this case a valid marriage, and that the son of Radhoo was therefore legitimate. I understand my learned colleague to consider that the presumption is excluded, because the alleged wife is of a different caste from the husband and that unless sanctioned by custom, such a marriage is not legally binding. Upon a question of this kind, I should hesitate greatly before I differed from my learned colleague; it being a question with which he is peculiarly well qualified to deal. I only wish to point out that no legal authority is quoted for this position. In the ancient text-books no such authority could be found, because it is admitted (1) that in ancient times the Soodras were but one general caste or class; (2) that in ancient times the marriage of a man with a girl of a different class or caste was not prohibited. Whether the comparatively modern prohibition against intermarriage of persons of a different class or caste extends in this part of India to the modern subdivisions of the Soodra caste or class is a matter of very great importance. The restrictions thus imposed would be very numerous; and restrictions upon marriage,

Digitized by Google

however convenient socially, assume quite a different aspect when recognized by the law. If the law does recognize them, of course, they cannot be enforced: but if it does not, it would be wrong to impose them, and I feel great hesitation in saying for the first time that there is a legal bar to these marriages.

I do not, however, consider it necessary to express any difference of opinion upon this point, because I see no objection to the order of remand proposed by my learned colleague. If it appears upon the evidence taken that these two classes or castes may intermarry, the presumption from cohabitation may then be made as in other cases. If, on the other hand, it be found that they cannot, there will be no room for any such presumption.

The 6th March 1875.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Mortgage-bond—Execution Sale — Mortgagee's Lien.

Case No. 591 of 1874.

Special Appeal from a decision passed by the Judge of Cuttack, dated the 20th November 1873, *affirming a decision of the Subordinate Judge of that district, dated the 31st December* 1872.

Gopee Bundhoo Shantra Mohapattur (one of the Defendants) *Appellant,*

versus

Kalee Pudo Banerjee (Plaintiff) *Respondent.*

Baboos Mohesh Chunder Chowdhry and *Obhoy Churn Bose* for Appellant.

Baboos Chunder Madhub Ghose and *Mohendro Lall Mitter* for Respondent.

Defendant No. 1 (G C) on 9th August 1863, borrowed money from plaintiff upon a bond, hypothecating property by way of simple mortgage. On 27th August 1867, he executed a similar instrument in favor of defendant No. 2 (G B) on a further loan. On 13th May 1867, he executed a second bond in favor of plaintiff for the amount (principal and interest) due under the first bond. On 29th May 1869, plaintiff obtained a decree against defendant No. 1 for the money due under the bond of 13th May 1867; and on 30th July 1870, defendant No. 2 (G B) also obtained a decree upon his bond against the said debtor. In execution of plaintiff's decree, the property was sold and purchased by decree-holder on 25th August 1870. After this (G B) also executed his decree and attached the property which, notwithstanding plaintiff's objection, was put up to sale and purchased by (G B), who obtained possession. Plaintiff sues to have the sale to the latter set aside, and his own purchase upheld:

HELD, that plaintiff, on purchasing at the sale in execution, took subject to the defendant's security to this extent that the defendant by paying off the prior debt might establish his own security.

HELD, that the question whether plaintiff's first security was extinguished by his taking a second security, covering the original debt with interest, would depend upon the intention of the parties which, in this case, was shown by the original bond having remained in the possession of the creditor.

Markby, J.—THE property in dispute in this case originally belonged to defendant No. 1, Gobind Chunder Mohapattur. On the 9th of August 1863, Gobind Chunder borrowed Rs. 243 from the plaintiff's father, and executed a bond in which this property was hypothecated by way of simple mortgage. On the 27th August 1866, the aforesaid Gobind Chunder also executed a similar instrument in favor of the defendant No. 2, Gopee Bundhoo Shantra, from whom he borrowed a further sum of money. Subsequent to this, on the 13th May 1867, having failed to repay the first loan with interest, the debtor again executed another bond in favor of the plaintiff's father for Rs. 400, being the total amount of principal and interest then due under the first mentioned instrument mortgaging also the same property. On the 29th May 1869, the plaintiff obtained a decree against the defendant No. 1 alone for the money due under the bond dated the 13th of May 1867, and the defendant also obtained a decree upon his bond against the said debtor only on the 30th July 1870. In execution of the decree obtained by the plaintiff, the property in dispute was sold and purchased by the decree-holder on the 25th August 1870. After this purchase by the plaintiff, the defendant executed his decree and attached the property, upon which the plaintiff preferred an objection against the sale. The objection of the plaintiff was overruled, and the property, having been again put up to sale, was purchased by the defendant on the 7th September 1871. The defendant, after his purchase, has succeeded in obtaining possession of the property, and hence the plaintiff in this action seeks to obtain possession from the

Digitized by Google

defendant's hands, and to have the sale to the latter set aside and his purchase upheld.

The suit seems to have been founded, first, upon his prior purchase; secondly, upon the priority of his mortgage lien; and thirdly, upon an allegation that the bond executed in favor of the defendant is not a *bonâ fide* instrument. The third ground seems to have been subsequently abandoned, as it was not raised in any one of the issues laid by the Lower Court. Both the Courts below have given the plaintiff a decree for possession simply without making any declaration that the plaintiff's purchase is to have priority in all respects to that of the defendant. But the District Judge to make his judgment complete has also decided in his judgment the question of priority between the mortgages, and has come to a conclusion favorable to the plaintiff.

The case was argued some time ago, and we have deferred giving our judgment, because there was a case before the Full Bench which was likely to have an important bearing upon it. That decision has been given, and it is now settled that a sale, in execution of a decree obtained by the holder of a bond pledging land as a security against his debtor, passes to the purchaser the whole interest *both* of the debtor and of the execution creditor, and that this is so whether the decree is what is called a simple money decree, or what is called a decree declaring the lien. This disposes of one point in this case as to which we thought at one time it might be necessary to direct a further enquiry. It makes it clear that it is of no importance whether the decrees obtained by these parties did or did not "declare the lien." The majority of the Judges who took part in the Full Bench decision also expressed their opinion that a sale by a creditor holding security does not, as against persons who have obtained any interest in the property subsequent to the security bond upon which the judgment is obtained, pass an absolute title. It is not stated by those learned Judges what the rights of those persons are, and I was not a party to that portion of the judgment; but I believe it was considered that the claimants, subsequent to the security have a right to pay off the debt on account of which the estate was sold, and to treat the purchaser as the owner of the estate subject to their own claim.

This is a binding decision and must be applied to the present case.

In the present case, therefore, even assuming that the defendant holds a security subsequent to that of the plaintiff, the plaintiff, on purchasing at the sale in execution, still took subject to the defendant's security to this extent, that the defendant by paying off the prior debt may establish his own security.

I was at one time doubtful whether the result of the plaintiff having bought up his own security might not be to let in the defendant as the first encumbrancer; and if the plaintiff had been asking the Court to protect him in equity from that result, we do not think that we should have given him such protection. We entirely concur with those learned Judges who have expressed their strong disappropriation of a mortgagee buying up his own security (see V B. L. R., O. C., 460, Norman, J.; V B. L. R., O. C., 450, Macpherson, J.; and V B. L. R., O. C., 83, Phear, J.); but the person who really asserts the right here is the defendant whose conduct, we may observe, has not been less blameable; and as far as we can gather from the Full Bench decision the only right which he has is to establish his security by paying off the prior encumbrancer: until he does that, he has no right at all.

As to the question whether the plaintiff's first security was extinguished by his taking a second security covering the original debt and the accumulated interest, we see no reason to differ from the decision of the District Judge, who decides this point in favor of the plaintiff. This question would depend upon the intention of the parties, and that intention is, we think, clearly shown by the original bond having remained in the possession of the creditor.

As to the possession of the property the plaintiff is clearly entitled. The right to the possession was in the debtor, and passed to the plaintiff under his purchase.

The result, therefore, will be that the decisions of the Lower Courts giving the plaintiff possession of the property will be affirmed; and there will be a declaration that, upon the defendant's paying to the plaintiff the principal and interest due on the bond of 1863, the defendant will become holder of the first charge on the property, under the bond executed in his favor in August 1866. The mortgagor, who is made a party to this suit, makes no claim; nor has there any claim been made against him. Under the circumstances, we think that each party ought to pay his own costs in the Courts below, as also in this Court.

Digitized by Google

The 8th March 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Act IX of 1861—*Suits regarding Minors—Jurisdiction.*

Case No. 1906 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 25th June 1874, *reversing a decision of the Moonsiff of Doobrajpore, dated the 31st March* 1874.

Kristo Chunder Acharjee (Plaintiff) *Appellant,*

versus

Kashee Thakooranee and another (Defendants) *Respondents.*

Baboo Taruck Nath Sen for Appellant.

Baboo Soorendro Kishen Dutt for Respondents.

Suits regarding minors are cognizable by principal Civil Courts of districts. Moonsiffs have no jurisdiction to try them.

Glover, J.—I THINK that the Subordinate Judge was right in his view of the law.

Act IX of 1861 is expressly stated in the preamble to be an Act for the purpose of "amending" the law relating to minors, and it specifies a particular Court in which suits regarding minors are to be brought. In so far as it restricts the preferring of claims to the principal Civil Court of the district, it does no doubt take away from the Moonsiff's Courts a power which they may have had before the passing of the Act, but it does not oust the jurisdiction of the Civil Court, any more than the value limit ousts the inferior Civil Courts from jurisdiction in particular cases. The remedy lies in a Civil Court, but it is only one Court in a district that can apply it. The case of Musst. Huro Soonduree Bystubee *v.* Joy Doorga Bystubee,* IV Ben., 36 Appendix, is in point.

The words of Act IX of 1861 seem to be conclusive, and I would reject the special appeal with costs.

Mitter, J.—I am also of opinion that the Moonsiff's Court had no jurisdiction to entertain this suit. By the Regulations of 1793, such suits were only cognizable by Dewanny, Zillah, and City Courts, *i.e.* principal Civil Courts of districts; and jurisdiction has never been taken. Subsequently when subordinate Courts established, this jurisdiction was left touched, because only these suits, the matters of which were capable of valuation were rendered cognizable by Consequently, when Act IX of 1861 passed, it was merely declaratory of the law was in respect of the jurisdiction the principal Civil Court, only substituting a special procedure. The Subordinate has taken a correct view in holding that Moonsiff of Doobrajpore had no jurisdiction to try this suit. I therefore concur in ordering this special appeal with costs.

* 13 W. R., Civil, p. 112.

The 9th March 1875.

Present:

The Hon'ble A. G. Macpherson, *Officiating Chief Justice,* and the Hon'ble C. Pontifex, *Judge.*

Hindoo Law—Adoption—Brother's Son.

Case No. 1 of 1874.

Regular Appeal from a decision passed by the Subordinate Judge of Cuttack, dated the 15th September 1873.

Gocoolanund Doss (one of the Defendants) *Appellant,*

versus

Mussamut Ooma Daye (Plaintiff) and others (Defendants) *Respondents.*

Mr. J. T. Woodroffe for Appellant.

Baboos Unnoda Pershad Banerjee and *Mohesh Chunder Chowdhry* for Respondents.

An only son cannot be adopted except by father's brother, in which case he becomes dwyamushayana (the son of both the brothers). But the fact of the existence of a brother's son does not deprive the uncle of the right to adopt any one save that the selection being finally a matter of conscience discretion, not of absolute prescription.

Macpherson, C.J.—WE agree with Subordinate Judge in thinking it proved that the defendant Gocoolanund for years (probably 40 years or more) lived with was brought up and treated by Hulodhur as his son: also that he was given in marriage by Hulodhur as his son. Moreover

Digitized by Google

we agree with the Subordinate Judge in deeming it clear from the documents which are in evidence, that Gocoolanund was constantly acknowledged by others as the adopted son of Hulodhur, and was so styled by Hulodhur himself in a written statement filed in Court in October 1848. In short, we have no manner of doubt that no one disputed the fact that Gocoolanund was Hulodhur's adopted son, until after Hulodhur's death. That being so, it is hardly necessary for us to consider whether it is likely that Hulodhur would have wished to adopt under the circumstances in which he was placed. As the Subordinate Judge has, however, laid much stress on the supposed improbability of his having so wished, we feel bound to say that we can see nothing which makes it in any degree improbable that the adoption took place as alleged.

It is objected, first, that there is no proof of the necessary ceremonies having been performed; and second, that even if the adoption did in fact take place, it must be considered void, because one Dinobundoo, the only son of a brother of Hulodhur, was alive, and, being alive, Gocoolanund *could* not lawfully be adopted.

As regards the performance of the ceremonies, the evidence seems to us sufficient. There is evidence of *homa* and *putresti jág*. It is said that this evidence is bad and unreliable, but it seems as good as we could expect to be produced to prove the performance of such ceremonies forty years ago, and we are satisfied with it: we therefore find as a fact that Hulodhur did adopt Gocoolanund.

Assuming the fact of the adoption there is some difficulty as to its validity, Dinobundoo, the son of a brother, having been alive at the time,—as there is something in the nature of authority to support the objection. But we have no evidence as to this Dinobundoo, what his age was at the time of Gocoolanund's adoption, whether he was married or unmarried, &c. Nor do we know whether his father would have permitted his adoption by Hulodhur. This, however, we do know that Dinobundoo's father never considered that Dinobundoo's being in existence rendered the adoption of Gocoolanund invalid: for Dinobundoo's father himself treated Gocoolanund as the adopted son of Hulodhur. Moreover, it is clear that the parties to this suit, none of them, when this litigation commenced, considered the adoption assailable on this ground. For they set up another adoption, that of one Radha Kishen, since deceased, whom they allege Hulodhur adopted about thirty years ago. If Dinobundoo's existence invalidated the adoption of Gocoolanund, it would have equally invalidated that of Radha Kishen. But so far as the parties themselves are concerned, Dinobundoo's existence was never dreamt of as forming any obstacle.

No doubt, it is said by Mr. Sutherland (see his Synopsis, page 665, Stoke's edition) that the only son of a whole brother, if no other nephew exist for adoption, must be adopted by his uncle requiring male issue, and is dwyamushayana, or son of two fathers. It is said that no man having a brother's son alive, who can be taken as dwyamushayana, can adopt any other person.

According to the rules laid down in the Hindoo law books it is wrong to adopt an only son; but an exception is made in the case of an only son being adopted by his father's brother, when he becomes dwyamushayana, the son of both the brothers. And a special adoption of this kind is said to be proper, and one which ought to be made. But we do not think that the mere fact of the existence of a brother's son deprives the uncle of the right to adopt any one save that son, if the son's father refuse to give him in adoption. And even if the brother was willing, we incline to the opinion that the provisions of the Hindoo law really go no farther than to sanction the adoption of an only son (such an adoption being ordinarily bad) if the adoption is made by his father's brother, when he can become dwyamushayana. In all cases of an adoption, and especially in a case such as this, where the adoption has been deemed good and apparently acquiesced in for many years by all the parties, we think that the rule which ought to be applied is that which is in fact usually followed, and is well indicated by Sir Thomas Strange in his work on Hindoo Law, volume I, page 85, where he says:—"The result of all the authorities is that the selection is finally a matter of conscience and discretion with the adopter, not of absolute prescription, rendering invalid an adoption of one not being precisely him who on spiritual considerations ought to have been preferred." Whatever may be the strict rule laid down by the texts of the old Hindoo writers, and even supposing it to be what Mr. Sutherland states it is, there is no doubt that in practice Hindoos are not in the habit of restricting their adoption in the manner now contended for.

Digitized by Google

As we uphold the adoption, it is not necessary for us to decide another question which has been raised, *viz.*, whether the plaintiff has any right to maintain this suit at all. As at present advised, we are of opinion that the plaintiff could not, in default of adoption, be entitled to more than half of what she claims; that is to say, supposing she had any right at all, she could have only an eight-anna share, her sister Parbutty taking the other eight annas. But we are inclined to think that the plaintiff would have no title whatever, being a sonless widow: and we think that the law is correctly laid down by Mr. Justice Strange in his Manual, page 80, paras. 328, 329, from which it appears that Parbutty would take in preference to the plaintiff. But it is not necessary to go into that point, as we find that the adoption was made in fact and is valid in law.

The result is that the decision of the Subordinate Judge is reversed, and the plaintiff's suit dismissed with costs in this Court and in the Lower Court.

The 9th March 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Ameen's Inquiry—Minor — Decree — Execution Piece-meal.

Case No. 526 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Purneah, dated the 21st September 1874, *affirming an order of the Subordinate Judge of that district, dated the 16th July* 1874.

Nund Coomar Fouteldar (Judgment-debtor) *Appellant,*

versus

Bunso Gopal Sahoy and another (Decree-holders) *Respondents.*

Baboo Amarendro Nath Chatterjee for Appellant.

Mr. R. T. Allan for Respondents.

A minor cannot be bound by an Ameen's inquiry during which he was not properly represented.

A decree cannot be executed by purchasers of aliquot parts of it.

Glover, J.—We think that the judgment of the Judge in this case must be set aside.

Kashee Deen Doobey obtained a decree against one Radha Bibee for wassilat on the 27th of February 1867, and sold his in 8 annas or one-half to Gobind Ram other 8 annas to Soomar Chand Doobey in his turn sold to the present petiti Bunso Gopal Sahoy and Het Narain. last have taken out execution agains judgment-debtor one Munnee Bibee, minor daughter of Radha Bibee, repres by her guardian Nund Coomar Foutelid

It appears that shortly after the dea Radha Bibee, Gobind Ram, the purchas one 8 annas share of the decree, took execution, and an Ameen was deputed make the usual enquiry as to the amou wassilat. Notice was at first served o Golab Chung as representing the minor, he was found to have died, and the de holder applied to have the enquiry condu in the presence of Munohur Doss, the u and nearest relative of the minor. Munc Doss refused to act in the interests of niece and the enquiry into the amount the wassilat proceeded *exparte*. After t Ameen's report was sent in Nund Coom filed a petition of objection in which he u various exceptions to the Ameen's enqui The Judge, however, refused to look i them because the petitioner was not minor's guardian. We do not see how Ameen's enquiry, granting that it embr the whole of the wassilat due under decree, can bind the minor, for it is clear she was not represented during that enqu Munohur Doss refused to act, and was present at the Ameen's investigation, Nund Coomar had at that time no autho to represent the minor, and was not allo to object to the Ameen's calculations they were concluded. It has been conten that the Judge gave Nund Coomar the op of another enquiry. There is no men of this concession in the Judge's decis but we gather from the seristah kyfeut the record that Nund Coomar was tol attend the Ameen at another local enqu but did not do so, and that a further appl tion from him for permission to have a fi enquiry was rejected. Be this as it m however, when Munohur Doss refused act, the decree-holder ought to have ta steps to have the minor, his judgment-deb properly represented, and as he did not so, I do not think that the Ameen's enqu into the amount of the mesne profits due the decree, and which enquiry was ordere at the instance of the first 8 annas sha holder, can in any way bind the mi Munnee Bibee.

But in any case the present execut

Digitized by Google

would be bad in law. A decree cannot be executed by purchasers of aliquot parts of it piece-meal and Gobind Ram's application to execute his 8 annas share ought to have been rejected in the first instance. The rule has been laid down in the case of Poorno Chunder Mookerjee *v.* Sharoda Churn Roy, XI Weekly Reporter, 241, and in Nobo Kishore Mojoomdar *v.* Anund Mohun Mojoomdar, XVII Weekly Reporter, 19, and in accordance with it the present decree-holder's application for execution of the half-decree cannot be allowed.

We think that the appeal should be allowed and the Judge's order reversed. Costs two gold mohurs.

The 9th March 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Rent Suit—Special Appeal—Act VIII (B.C.) of 1869 *s.* 102.

Case No. 236 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Bhaugulpore, dated the 10*th November* 1873, *reversing a decision of the Moonsiff of Madhepore, dated the* 16*th June* 1873.

Maharaj Coomar Nitressur Singh (Plaintiff) *Appellant,*

versus

Jhotee Tely (Defendant) *Respondent.*

Baboo Bhyrub Chunder Banerjee for Appellant.

Baboo Hureehur Nath for Respondent.

In a suit for arrears of rent on the basis of a shiro-namah, where the ryot denied that he had executed that document, and produced evidence to show that the rates mentioned in it were not correct, HELD that there was no question of right to vary the rent, and that the case therefore did not come under Act VIII (B.C.) of 1869 s. 102.

Glover, J.—THIS was a suit for arrears of rent under a hundred rupees in value, and the first question to be considered is whether under Section 102 of Act VIII (B.C) of 1869 a special appeal lies. It has been contended by the pleader for the special appellant, that in this case there was an attempt made by the plaintiff to vary the rent hitherto paid by the ryot, and that therefore, under the precedent of the 9th Weekly Reporter, page 91, Golam Mahomed Shaha *v.* Sharoda Pershad Mullick, a special appeal would lie. Without going into the circumstances of that case, which appear from the judgment of the Judge to be different from those now before us, it is sufficient to say that here the plaintiff sued the defendant, a ryot, on the basis of a shironamah claiming a certain amount as rent upon a contract made between the parties. The ryot denied that he had ever executed the shironamah, or that the rate mentioned therein was a proper rate of rent, and he produced certain evidence to show that the rates mentioned in the shiro-namah were not correct. There was no doubt a dispute between the parties as to what was the rate of rent paid previously. But it is quite clear that the Judge did not decide any question of right to enhance or any question of right to vary the rent of the ryot, and it was only in a case of that sort that Section 102 Act VIII (B.C.) of 1869 allows a special appeal.

The appeal is, therefore, rejected with costs.

Mitter, J.—I concur.

The 10th March 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Evidence Act (I of 1872*) s.* 33*—Deposition—Personal Testimony.*

Case No. 1836 of 1874.

Special Appeal from a decision passed by the 1*st Subordinate Judge of Hooghly, dated the* 11*th May* 1874, *reversing a decision of the Officiating Sudder Moonsiff of that district, dated the* 31*st December* 1873.

Bhoobun Moyee Dossee and another (two of the Defendants) *Appellants,*

versus

Umbica Churn Sett and others (Plaintiffs) *Respondents.*

Mr. C. Jackson and *Baboo Mohinee Mohun Roy* for Appellants.

Baboos Sreenath Doss and *Taruch Nath Sen* for Respondents.

A deposition made by a person wherein he denied on oath that he had presented a certain petition in Court which purported to be from him, was held to be inadmissible as evidence under Act I of 1872 s. 33,

Digitized by Google

because the person might have been brought into Court, but was not brought by those who pleaded the said deposition.

Jackson, J.—We think that the defendants are not entitled to rely upon the bar of limitation in this case, inasmuch as there seems to have been good evidence to show that Chundee Churn, who was the *furzee* of the defendants, and effected the purchase on their behalf, did put in the petition referred to on the 7th April, withdrawing his claim to a certificate of purchase in respect of the 16 annas, and unreservedly admitting the right of the plaintiffs to an 8-anna share. The defendants sought to get rid of the effect of this petition by producing a deposition made by this Chundee Churn on another occasion, in which it is said he denied on oath that he presented this petition. It is asserted, and apparently not denied, that Chundee Churn has been since, as he was at the time of the purchase, in the service of the defendants. He was, therefore, a person whom the defendants might, if they thought fit, have produced in Court and examined, but they did not do so. On the other side, the plaintiffs appear to have taken every step they could to get him into Court, but they were unsuccessful. Under this circumstance, under Section 33 of the Evidence Act, the previous deposition could not be used as evidence. It seems to us that the Subordinate Judge had good grounds for his finding reversing the decision of the Moonsiff, and that there is ample and serious suggestion of *mala fides* on the part of the defendants in this matter. We think the special appeal must be dismissed with costs.

The 10th March 1875.

Present :

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Specially registered Bond—Act XX of 1866 *s.* 66 *—Second Decree for Interest—Mortgagee's Lien—Voluntary Payment.*

Case No. 79 of 1874.

Regular Appeal from a decision passed by the 2nd Subordinate Judge of Backergunge, dated the 19th January 1874.

Muthoora Mohun Roy Chowdhry and others (Plaintiffs) *Appellants,*

versus

Pearee Mohun Shaha and another (Defendants) *Respondents.*

Baboo Ashootosh Dhur for Appellants.

Baboo Kalee Mohun Doss for Respondents.

P lent money to S upon a specially registered tumsook pledging immoveable property, and afterwards obtained a decree under Act XX of 1866 s. 53 for principal and interest. More than four years later, he brought a further suit against S to recover the interest due under the same bond. Meanwhile plaintiffs also lent money to S under a bond by which the same property was pledged, and also recovered a decree in execution of which the property was sold. P then proceeded to attach the same property in execution of his second decree when plaintiffs objected under Act VIII of 1859 s. 246, but ineffectually; and after that, to protect the property which they had purchased, they paid a sum of money into Court which was subsequently taken out by P. They now sue to recover that money:

Held that, after execution of P's first decree against S, he was not entitled to a second decree for interest so as to reserve a lien upon the property pledged; and had therefore no right to take out the money deposited by plaintiffs.

Held that, under the circumstances the payment of the money into Court was not a voluntary payment, and the plaintiffs were entitled to recover it.

Jackson, J.—The present suit is brought by the plaintiffs who are described as money-lenders against, first, Pearee Mohun Shaha, and secondly, Shoshee Bhoosun Bhuttacharjee under the following circumstances:—Pearee Mohun Shaha appears to have lent money to Shoshee Bhoosun upon a specially registered tumsook pledging immoveable property. He proceeded upon that tumsook, and obtained from the Court having jurisdiction a decree under Section 53 Act XX of 1866 for the principal amount with interest due up to the date of the decree. This decree bore date the 20th December 1866, corresponding with Pous 1273. Pearee Mohun, if he had chosen, might have applied immediately for execution of that decree. It does not appear precisely when it was executed, but it is evident that considerable delay must have taken place, because Pearee Mohun afterwards in 1871 brought a further suit against Shoshee Bhoosun to recover the interest due under the same bond for a period of more than four years, from which it seems that the principal amount must have remained unrecovered for that period subsequent to the date of the decree. In the meanwhile the plaintiffs in 1277 also lent money to Shoshee Bhoosun likewise under a bond by which the same property was pledged, and they also recovered a decree against him. The property was put up to sale, and was sold on the 6th February 1872. Pearee Mohun Shaha then, having got his second decree already mentioned, proceeded to attach and sell the immoveable property in satisfaction of that decree when the plaintiffs objected under Section 246, but

Digitized by Google

ineffectually ; and after that, in order to protect the property which they had purchased, they paid into Court the sum of Rs. 3,100, which was afterwards taken out by Pearee Mohun Shaha.

The present suit is to recover that money, and to obtain a declaration that the property had been purchased by them free from any lien in respect of Pearee Mohun's bond. The plaint makes a formal allegation of fraud and collusion against the two defendants, and in support of that allegation evidence was given to show that Shoshee Bhoosun, instead of appealing against the second decree obtained by Pearee Mohun as the plaintiffs say he ought to have done, corruptly took out the sum of Rs. 700 which was in deposit, and abstained from filing an appeal. In the trial before the Court below all these facts were found to be true, and the Subordinate Judge came to the conclusion that Shoshee Bhoosun had taken the Rs. 700, and therefore in collusion with Pearee Mohun omitted to appeal against the second decree obtained by him. But the Subordinate Judge was of opinion that Pearee Mohun was not precluded by the first decree which he obtained under Section 53 of the Registration Act from proceeding further and obtaining a further decree in respect of the interest which he had not recovered under the first decree. He, therefore, considered that the second suit and the decree were regular and proper, that the plaintiffs had purchased the mortgaged property subject to Pearee Mohun's lien, and he therefore refused to give plaintiffs a decree for that sum.

The question whether the holder of a bond specially registered who recovers a decree under Section 53 is competent to proceed further on the same cause of action has lately been discussed by a Full Bench. The judgment has not yet been reported ;* but as I was one of the Judges who composed the Full Bench, I may state that the effect of that decision as I understand it is that in respect to the amount to be recovered under the bond, the party who elects to proceed under Section 53, and obtains a decree under that Section has exhausted his cause of action ; but that in the event of failure to recover the amount decreed to him under that Section, and in the event of the property pledged having been transferred to another person, he may bring a suit against that other person jointly with the vendor to enforce his lien upon that property. In the case before us, it seems to be specially inequitable that Pearee Mohun should be permitted to bring a second suit for interest at the rate of 18 per cent. per annum, and enforce it to the prejudice of the present plaintiffs, inasmuch as no justification of his second decree after the execution of his first decree is stated ; and the plaintiffs, who lent their money in 1277, might well have believed and probably did believe that they obtained a good lien upon the property pledged to them, and that Pearee Mohun had no further claim against that same property. We think, therefore, that Pearee Mohun had no right to recover the amount of interest by the second decree against Shoshee Bhoosun so as to reserve a lien upon the property pledged, and that consequently he was not entitled to take out the sum of money deposited by the plaintiffs Rs. 3,100. There has been another discussion before us to-day on the subject of voluntary payment, but we may take it that the claim was made under such circumstances that the plaintiffs were obliged to take care of their own interests, and are therefore justly entitled to recover the money paid by them. We think, therefore, that they are entitled to that amount with interest at the Court rate of six per cent. per annum. The appeal will be allowed with costs.

* *Ante*, p. 187.

The 12th March 1875.

Present :

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Act VIII of 1859 *s.* 97—*Permission to sue again—Appeal—Jurisdiction.*

In the matter of Omesh Chunder Mundal, *Petitioner,*

versus

Thakoor Doss Mookerjee, *Opposite Party.*

Baboo Mohinee Mohun Roy for Petitioner.

Baboo Opendro Chunder Bose for Opposite Party.

A suit which was brought in a Moonsiff's Court having been withdrawn after issues joined, with permission to sue again, it was brought again and decided against plaintiff, but was re-opened on an application for review, and decreed. The defendant appealed, and the District

Digitized by Google

Judge questioned the propriety of the order reserving to plaintiff permission to sue again.

HELD, that the Judge had no power to enter into that question.

Jackson, J.—IT appears to us that the Judge, in reversing the judgment of the Moonsiff on the grounds stated, has gone beyond his competence. The Judge himself states that the "suit had been brought in the first instance as No. 776 of 1873, and was withdrawn by the plaintiff after issues joined with permission to sue again." He says: "It was then brought under No. 1090 of "1873, and was decided against plaintiff under "Section 148, but was re-opened on an appli- "cation for review. It has now been decreed "in plaintiff's favour, and the defendant "appeals." The Judge afterwards states: "But the main question now is whether the "plaintiff having withdrawn his suit No. 776 "with reserved permission to sue again, such "reservation was properly made, or whether "the case should not be treated as *res* "*judicata*,"—He then observes that the case in III B. L. Reports, P. C., 48, Watson *versus* the Collector of Rajshahye* seems to be exactly in point. Now that case is not in point, because that was a suit commenced before the passing of Act VIII of 1859, and as observed by their Lordships of the Judicial Committee the law before the passing of the Civil Procedure Code contained no provision under which a suit could be dismissed with leave to bring a fresh suit. The circumstances of that case are very familiar to me, because I happened to be the Judge of Rajshahye who made the order. The circumstances were of a peculiar kind, and it is difficult even now to see what other order could have been made. But that has nothing to do with the present case, for Section 97 says expressly:—"If the plaintiff "at any time before final judgment satisfy "the Court that there are sufficient grounds "for permitting him to withdraw from the "suit with liberty to bring a fresh suit for "the same matter, it shall be competent to "the Court to grant such permission on such "terms as to costs or otherwise as it may "deem proper." Now if the Legislature had meant to limit that power to a period before the joining of issues or before the commencement of the trial, it would have said so, but the words are "at any time before final judg- "ment." No doubt the further the case proceeds before decision and the greater length that it has gone, the greater must be the caution with which discretion under this Section should be exercised, but the Court having granted the leave and proceedings having again commenced under that leave, it appears to us that the District Court had no power to enter into the question of the propriety of the Moonsiff's order in granting the leave.

As to the other point relating to the re-opening of the case on an application for review, we do not quite understand the Judge on that point. He seems to consider that the reasons given by the Moonsiff were not such as justified him in accepting the evidence, but as a matter of fact he did accept the evidence. The judgment of the Judge must be quashed, this rule must be made absolute, and the appeal must be tried on its merits. Costs Rs. 16.

* 12 W. R., P. C., 43.

The 12th March 1875.

Present:

The Hon'ble L. S. Jackson and W. F. McDonell, *Judges.*

Application under Act XL of 1858.

Case No. 19 of 1875.

Miscellaneous Appeal from an order passed by the Judge of Hooghly, dated the 18th January 1875.

Koosoom Kaminee Debee (Petitioner) *Appellant,*

versus

Chunder Kant Mookerjee and others (Objectors) *Respondents.*

Mr. W. C. Bonerjee and *Baboo Poorno Chunder Mookerjee* for Appellant.

Baboo Sreenath Banerjee for Respondents.

An application for a certificate under Act XL of 1858 need not refer to the estate of the deceased, but ought merely to set forth that there is property to which the minor is entitled, and of which the applicant claims the right to have charge.

Jackson, J.—THE appellant in this case, who is the widow of one Jogendro Nath Mookerjee, applied on the death of her husband for a certificate, under Act XL of 1858, to administer to the property to which her infant son was entitled. She appears to have expressly stated in her application that she only applied in respect of what had been the separate property of her deceased husband, and did not apply in respect of the

Digitized by Google

undivided share of the joint property of which her husband had been one of the co-sharers. The Judge, on what grounds we do not understand, gives this reason for refusing the application. He says :—"The "present application cannot be accepted "because it does not refer to the entire estate "of the deceased, but only to a portion stated "to be his own separate property." Now an application of this kind need not refer to the estate of the deceased person, but should merely set forth that there is property to which the minor is entitled and of which the applicant claims the right to have charge. As far as we see it is in fact admitted for the respondent, and there is no objection that the widow is the next friend of the minor, and there is no reason why she should not be allowed the certificate she prays for under the Act. It appears to us that the Judge ought not to have refused the application, and that his order should be set aside with costs, three gold mohurs.

The 12th March 1875.

Present :

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

***Remand to Lower Appellate Court—Code of Civil Procedure s.* 354.**

Case No. 238 of 1874.

***Special Appeal from a decision passed by the Judge of Purneah, dated the* 18*th December* 1873, *reversing a decision of the Moonsiff of Kishengunge, dated the* 16*th April* 1873.**

Shaikh Umer Ali (one of the Defendants) *Appellant,*

versus

Shaikh Rumzan Ali (Plaintiff) *Respondent.*

Mr. C. Gregory for Appellant.

Baboo Grish Chunder Ghose for Respondent.

Where a Subordinate Judge's decision in appeal was not a right decision (his orders having been impossible of execution), the District Judge was held to have been empowered under Act VIII of 1859 s. 354 to send the case back, after fixing an issue, for a finding.

Glover, J.—THIS was a suit by the plaintiff for the recovery of the person of his alleged wife, Mussamut Laroo. The defendant Umer Ali, who is Mussamut Laroo's brother, pleaded in the first instance that there had been no marriage between the parties, and that the girl was a minor at the time the plaintiff alleged the marriage to have taken place.

The Moonsiff, before whom the case first came, after summing up the evidence and stating his opinion that the girl was of full age at the time of the alleged marriage, arrived at the conclusion that, for the purposes of the suit, Mussamut Laroo ought to be considered a minor. He then went on to consider other questions, and finding that the plaintiff had failed to prove the marriage, dismissed his suit.

Thereupon, an appeal was made to the Subordinate Judge. He considered, and we think very properly, that the way in which the Moonsiff had decided the question of Mussamut Laroo's minority was not the proper way, and he directed the Moonsiff to appoint three respectable and trustworthy women to go and see Mussamut Laroo, and to find out from their statements, and from any other evidence which the plaintiff could give, whether Mussamut Laroo was really a minor at the time of her alleged marriage with the plaintiff. The Moonsiff failed to carry out this order,. and sent a proceeding to the Subordinate Judge, stating that he found it impossible to procure the attendance of three women of the class described. Upon which the Subordinate Judge directed that if women of position could not be had, the Moonsiff should get other women to prove the point before him. Upon that the Moonsiff called upon the plaintiff to produce or to assist in finding the women witnesses required, and on his failing to do that, he again dismissed his case. Thereupon there was an appeal to the Judge, Mr. Ward, who considered that the method adopted by the Subordinate Judge to fix the date of Mussamut Laroo's birth was altogether improper; and he sent back the suit to the Court of first instance, with directions to take certain evidence and to decide upon it the real point in question,—*viz.*, the date of Mussamut Laroo's birth.

Against this order there is a special appeal: and it is contended by Mr. Gregory that the plaintiff having had every opportunity of proving the legality of his marriage, ought not now to have a new case made for him, or be given another opportunity of proving it; it was contended moreover that the Judge had no power to remand the case.

Now it is quite clear that the orders of the Subordinate Judge were impossible of execution. No amount of women witnesses

Digitized by Google

by merely looking at Laroo could possibly tell what the girl's exact age was, or settle the question as to the date of her birth other than by guess.

It cannot be said, we think, that the decision of the Subordinate Judge was a right decision on the question before him, and if it was not, then under Section 354 the Judge was empowered to send the case back, after fixing an issue, as he has done, for a finding.

It is said that the Judge had no authority to take the case out of the hands of the Subordinate Judge, but that Subordinate Judge is no longer in the district; and it is not contended that the parties to the suit have been in any way prejudiced by the transfer.

The special appeal is dismissed with costs. Vakeel's fees one gold mohur.

The 12th March 1875.

Present:

The Hon'ble A. G. Macpherson, *Offg. Chief Justice*, and the Hon'ble G. G. Morris, *Judge.*

Act XL of 1858 *s.* 12—*Collector—Court of Wards—Act IV (B.C.) of* 1870 *s.* 69—*Minor.*

Cases Nos. 306 to 310, 314, and 315 of 1873.

Regular Appeals from a decision passed by the Subordinate Judge of Shahabad, dated the 6th September 1873.

Abdool Hye, Manager on behalf of the Court of Wards (Defendant) *Appellant*,

versus

Baboo Mitterjeet Singh and others (Plaintiffs) *Respondents.*

Mr. J. P. Kennedy for Appellant.

Mr. J. T. Woodroffe for Respondents.

On 27th July 1871, a disqualified proprietor B signed a duly attested document, declaring he had adopted a boy by name D, the next heir R signing a declaration of his approval of the adoption. Before sanction of the Lieutenant-Governor could be obtained under Act IV (B.C.) of 1870 s. 74, B died, and the sanction was subsequently refused on the ground of B's death. On application made under Act XXVII of 1860, the Judge, on 28th March 1872, found the adoption good, and appointed one P to be guardian of the minor D, and directed the estate to be placed under the management of the Court of Wards.

M, a judgment-creditor of R's, failing to execute his decree against the estate of B, brought a suit to have it declared that R, as heir, had inherited all B's property, and that he, M, was entitled to have that property attached and sold in satisfaction of his decree. The only defendants were A H, manager under the Court of Wards and R. The Sub-Judge gave plaintiff a decree, declaring that D was not the legally adopted son of B. This was appealed from:

HELD that the Judge had no power to make any such order as that of the 28th March 1872, in regard to the Court of Wards. What he had power to do under Act XL of 1858 s. 12 was to direct the Collector to take charge of the estate, and it would then have become the duty of the Collector to appoint a manager and a guardian in the same manner, &c., as if the minor's property and person were subject to the Court of Wards.

HELD that the minor's interests were not properly represented before the Sub-Judge, whose decree therefore could not stand so as to affect the minor, and that the minor must be made a party strictly in the manner prescribed by Act IV (B.C.) of 1870 s. 69.

Macpherson, C.J.—BINDESSUREE is said to have been a disqualified proprietor, whose estate was in the hands of the Court of Wards. We are now told (and it very likely is true) that his estates were under the care of the Collector under Section 11 of Act XXXV of 1858, he being a person of weak intellect, though not a lunatic. He never was married: and if he died without adopting a son, a relation named Rithbunjun was his heir.

On the 27th July 1871, Bindessuree signed a document, declaring he had adopted a boy by name Desputti, a near relative, and one whom he might properly adopt. This document was attested by the Collector and the Civil Surgeon of the District and Rithbunjun, the next heir, signed a declaration of his approval of the adoption,—the Collector attesting his signature also.

By Section 74 Act IV (B.C.) of 1870, "no adoption by any word, and no written "or verbal permission to adopt given by "any word is to be deemed valid without "the previous consent of the Lieutenant-"Governor, &c." Before such sanction could be obtained, on the 31st July 1871 Bindessuree died. The Collector subsequently tried to get the Lieutenant-Governor's sanction: but the man being dead, it was refused on the 10th of January 1872.

Bindessuree being dead, an application to the Judge of the District was made by Rithbunjun for a certificate under Act XXVII of 1860 (to collect debts, &c.); and two female relations of Desputti also applied, setting up his adoption, and claiming to be appointed his guardian, &c., under Act XL of 1858.

On the 28th of March 1872, the Judge, after going at length into the case, found the adoption good, notwithstanding that the

Digitized by Google

Lieutenant-Governor never consented to it: and he appointed Poorbooraj, one of the applicants, to be guardian of the person of the minor, and ordered "the estate under Section 12 Act XL of 1858 to be placed under "the management of the Court of Wards." The Judge had no power to make any such order as regards the Court of Wards. What the Judge had power to do under this Section 12 was to direct the Collector to take charge of the estate. If so directed, it would then have become the duty of the Collector to "appoint a manager of the property of the minor, and a guardian of his "person in the same manner, . . . so far "as the same may be applicable, as if the "property and person of the minor were "subject to the jurisdiction of the Court of "Wards." It is an entire mistake to suppose that, under Section 12 of Act XL of 1858, the Court of Wards can be directed to take charge.

The estate, however, apparently is in the hands and under the management of the Court of Wards. And we are informed, although the matter does not appear on the record, that the Court of Wards has been and is in possession under Act IV (B.C.) of 1870, and not under the Judge's order of the 28th of March 1872.

Rithbunjun (the next heir failing the adoption) was much involved in debt at the time Bindessuree died. Many suits had been brought and decrees made against him. Amongst others, one Mitterjeet had in 1863 got a decree in which more than Rs. 7,000 are claimed as still due from Rithbunjun. This Mitterjeet tried (after the death of Bindessuree) to execute his decree by attaching lands, &c., which belonged to the estate of Bindessuree, alleging that these lands now belonged to Rithbunjun as his heir. But he was unsuccessful; being met by the orders of the Court of the 28th of March 1872 upholding the adoption, and by the Court of Wards which was in charge of the estate. So he brought a suit to have it declared that Rithbunjun was the heir of Bindessuree, and had as such inherited all his property, and that he was entitled to have the property attached and sold in satisfaction of his decree against Rithbunjun.

It is this suit which is before us in the appeal No. 306.

On the 25th of March 1873, the plaint was filed. Mitterjeet is the plaintiff, and "Abdool Hye, manager under the Court of "Wards of the estate left by Bindessuree, "&c., lunatic, deceased, and Rithbunjun, "&c." are the only defendants. The plaint states that the suit is brought "to obtain an order for realization of the money covered by plaintiff's decree of 23rd December 1863," by sale of the properties left by Bindessuree, "lunatic, deceased," by declaring the right of inheritance of the judgment-debtor (Rithbunjun), and by declaring invalid the adoption of Desputti and cancelling the order of the Judge of March 28th, 1872. Then para. 1 (of the plaint) states that the money is due under the decree against Rithbunjun: that the estate of Bindessuree devolved upon Rithbunjun: and that plaintiff applied for an order to sell enough of it to satisfy his decree. Para. 2 says that in order to continue the management of the Court of Wards and protect the estate left by the lunatic from "creditors, Abdool Hye, manager of the estate of the deceased, in collusion with the relations of the deceased lunatic, set up the adoption of Desputti, &c." In para. 5 it is submitted that the lunatic was under the care of the Court of Wards under Act XXXV of 1858: and that the adoption was bad because not sanctioned by the Lieutenant-Governor, also because the proper ceremonies were not observed, and because neither the child adopted nor his natural mother were present, &c. The prayer of the plaint is for an order for the sale of the lunatic's estate, as the heritage of Rithbunjun, the judgment-debtor.

The defendant sued was "Abdool Hye, manager under the Court of Wards of the estate left by Bindessuree, lunatic, deceased." The minor was not a defendant. But the Court of Wards appeared and (June 24th, 1873) filed a written statement "as guardian of Desputti, minor, defendant." This written statement pleads, 1stly, that Bindessuree's estate never having vested in, nor been claimed by, Rithbunjun, his creditors could not call upon the minor, who was in quiet possession to prove his title; 2ndly, as letters of administration to the property of Bindessuree had been "granted to the minor under the Court of Wards," the creditors of Rithbunjun could not proceed against the property until these letters were cancelled and fresh letters granted to Rithbunjun; and 3rdly, the creditors could stand in no better position than Rithbunjun, who was not bound to claim the estate unless he pleased. In the remaining paras. of the written statement it was contended that Rithbunjun having given his approval to the

Digitized by Google

adoption was bound thereby, and neither he nor his creditors could impeach it: that all the necessary ceremonies were observed, and the adoption was good, Section 74 of Act IV (B.C.) of 1870, notwithstanding: that irrespective of the question of adoption, the minor took the property under the document of July 27th, 1871. Finally, in the last para. the plaintiff's right to recover was disputed, even supposing it to be established that Rithbunjun, and not the minor, took the property.

It should be noted that on the 3rd of May 1873, a petition was presented by Mussamut Poorbooraj praying to be made a defendant as guardian of Desputti, the minor. Her application was refused, "as the Court of "Wards is the guardian of the minor, and "there cannot be two people guardians of one "minor, and this woman has no connection "whatever with the case."

The written statement which was filed on behalf of, and is said to be the statement of, the Court of Wards, is not verified in the usual way, or at all. It is merely signed by two vakeels, and how the Court came to permit such a statement to be filed does not appear. Abdool Hye put in no written statement.

On the 24th of June 1873, Rithbunjun also filed a written statement, pleading the adoption of Desputti, and objecting to the plaintiff's right to enforce his decree against this estate even if the adoption were set aside.

On 26th June 1873 issues were fixed.

The first was,—"Can the plaintiff, one of numerous creditors of the supposed heir, call upon the Court of Wards, who is in possession as representing the adopted son, to show its title?" The second was in effect:—Rithbunjun having failed to get a certificate under Act XXVII of 1860, can plaintiff, a mere creditor of his, now sue for any property of the deceased Bindessuree without himself taking out such a certificate? The fourth was,—Did the alleged adoption take place? If so, was it valid? and the fifth was,—If Bindessuree's written declaration of July 27th, 1871 (to the effect that he had adopted Desputti), be invalid *quâ* adoption, will it operate as a testamentary bequest?

On the 6th of September 1873, the case was decided alone with some ten other similar cases brought by different plaintiffs, all creditors of Rithbunjun, and all contesting the validity of the adoption.

One judgment in one case was given referring to and adopting a previous judgment of the same Subordinate Judge of December 19th, 1872; in another case of the same kind in which one Bani Pershad was plaintiff; and the Subordinate Judge says this one judgment "governs" all these cases.

The Subordinate Judge gave the plaintiff a decree. He declared that Desputti was not the legally adopted son of Bindessuree, the adoption being had with reference to Section 74 of Act IV (B.C.) of 1870, the sanction of the Lieutenant-Governor not having been obtained, and also, apparently, because Bindessuree being a lunatic could not adopt. Thereupon the appeal now before us is presented.

It is to be observed that Abdool Hye alone appeals: though the only person who filed a written statement or appeared in the Court below was the Court of Wards. Why, if it was right that Abdool Hye should not appear in the Lower Court, it is right that he should appear as appellant here, we are at a loss to conceive. It may indeed be doubted how far, under the circumstances, he has now any right to be heard.

Along with this appeal and immediately following it, we have the appeals Nos. 307, 308, 309, 310, 314, and 315, all arising out of one or other of those other suits by creditors of Rithbunjun to which reference has been made.

In 307 and 314 the original defendant was "Abdool, Hye, manager under the Court of Wards of the estate left by Bindessuree, &c., lunatic, deceased." A written statement was filed on the part of the "Court of Wards as guardian of Desputti, minor defendant," and the Court of Wards appeals, although the memo. of appeal is signed by "Abdool Hye, manager under the Court of Wards, estates of the deceased Bindessuree, &c., *lunatic*" (by the pen of the senior Government pleader).

In 308 the proceedings in the Lower Court were similar. But Abdool Hye appeals signing the memo. of appeal in the same way, "manager under, &c., estate of, &c., *lunatic*."

In 309 "Abdool Hye, manager under the Court of Wards" is the defendant, it not being indicated (in the description of Abdool Hye) of what estate in particular he was the manager. In the body of this plaint it is stated that Abdool Hye, on behalf of Mussamut Poorbooraj, applied to the Judge under Act XL of 1858, informing him of the death of the lunatic, and of his having adopted Desputti, "with the object of saving "the estate of the lunatic from liability to "debts due to creditors and continuing

Digitized by Google

"management by the Court of Wards." The appeal to this Court is by the Court of Wards, the memo. being signed by Abdool Hye, "manager under the Court of Wards (estate of the late Bindessuree, lunatic.)"

In 310, Abdool Hye was a defendant: so was Rithbunjun: and so also was Asman Kooer, mother and guardian of the minor sons of Gomanbunjun, deceased, against whom and Rithbunjun the decree had been passed of which execution was sought. And Poorbooraj as guardian of Desputti, "minor son of Gomanbunjun, deceased" (his natural father), was also a defendant. Poorbooraj has never appeared or moved in any way in this suit. The appeal to this Court is by the Court of Wards, the memo. of appeal being signed by "Abdool Hye, manager under the Court of Wards."

In 315 the defendants are as in 310. The appeal to this Court is by the Court of Wards, and the memo. is signed by "Abdool Hye, manager under the Court of Wards, estate of the late Bindessuree, lunatic."

We refer to these details in order to call attention to the loose and irregular manner in which this litigation has been conducted. We may further mention that the suit out of which the appeal No. 314 arises is the only one in which a *complete* written statement on behalf of the Court of Wards was put in. In no one of the others was the statement complete: in each of these it was for the most part a mere reference to one or other of the paras. in the statement filed in 314 (which in the Lower Court was known as suit 20 of 1873). Thus in 306 the written statement was as follows:—

"*Para.* 1.—The same as the 1st ground of the written statement in suit 20 of 1873.

"*Para.* 2.—2nd ground, ditto.

"*Para.* 3.—3rd ditto,"

and so on down to para. 8, which is complete in itself.

The written statements in 307, 308, and 309 are precisely the same as in 306.

In 310 and 315, the first, second, and tenth paras. are complete, but the rest run thus:—

"3. The same as the first ground of the written statement in No. 20 of 1873.

"4. 2nd ditto,"

and so on to para. 9, which is said to be "the same as the 7th ground of the written statement in No. 20 of 1873."

The Lower Court was wrong in receiving such informal written statements at all: as also in receiving them without their being duly verified as the law requires, as also in receiving them from any one save a party to the suit. Every one of these written statements should have been returned to the vakeel who presented them.

When these appeals came on for hearing, Mr. Kennedy appeared (with Baboo Unnoda Pershad Banerjee) for the Court of Wards. He called our attention to the decision of a Bench of this Court in the case of Abdool Hye *v.* Baboo Banee Pershad (XXI Weekly Reporter, 228), which was an appeal from the judgment of the 19th December 1872 already mentioned as being the one to which the Subordinate Judge, in deciding the cases now before us, referred as containing the reasons for his decision. That case was remanded for re-trial, the minor not having been represented in the Court below: and much of what was said by the learned Judges in ordering the remand is pertinent to the matters appearing on the present appeals.

Mr. Kennedy contended that the suits now before us must also be remanded, in order that they may be properly tried in the presence of the minor.

There can be no doubt that the minor's right to this estate was distinctly in issue in the Lower Court. Two of the principal issues were whether Desputti is the legally adopted son of Bindessuree, and as such entitled to succeed to his estate as his heir, and whether, if he were not legally adopted, the document of July 21st, 1872, can be treated as a will, and whether Desputti takes the estate of Bindessuree thereunder. The Court has in fact decided the first of these issues unfavorably to the minor, though he was not a party to the suit. On the other hand, there has been no decision.

Those who took upon themselves the conduct of the defence in these suits, apparently never saw until the appeals came on for hearing before us, that the minor's interests were not properly represented. Even in the grounds of appeal filed in this Court, no allusion is made to the point that the proceedings in the Lower Court are bad, because the minor was not before the Court.

However, the decrees which have been passed cannot stand so as to affect the minor, and they must be set aside. The minor must be made a party strictly in the manner prescribed by Section 69 of Act IV (B.C.) of 1870. As Abdool Hye is stated by Mr. Kennedy to be still the manager of the estates of the ward under the Court of Wards, he must be named as his guardian for the purposes of the suits. But under Section 69, the Court of Wards has power to nominate some other person to be guar-

Digitized by Google

dian: and possibly it may be desirable that, if Poorbooraj has conducted the defence well in the suit of Banee Pershad, the conduct of the defence in these cases also should be entrusted to her. But whoever acts as guardian for the minor must be duly nominated in accordance with the provisions of Section 69. The guardian must file a written statement: and the suits must be tried *de novo* in the presence of the minor. By arrangement of the parties, probably one trial may be made to embrace all the suits.

It is to be hoped that those who are in charge of this minor will try to have his true position ascertained once for all. Desputti either is or is not entitled to this estate. If he is not entitled to it, the Court of Wards has no right (so far as appears in these proceedings) to intermeddle with the property. It is essential that the defence should be prosecuted actively and in a business-like manner, and that a series of expensive suits, such as these, should not be permitted to remain pending needlessly. The substantial issue is the same in all of them. Long ago, when it was found that the creditors of Rithbunjun were attacking this estate, it was the duty of the Court of Wards, or whoever really was the guardian of this minor, at once to come forward and take steps to have the title of the minor decided so as to avoid the multitude of suits and appeals which are now before the Courts, and the endless consequent expense.

Mr. Woodroffe for the plaintiffs complains of the hardship of having the cases remanded now, especially when there is (according to his view of the matter) no chance of eventual success on the part of the minor. But the plaintiffs never framed their suits properly. They did not make, and they never intended to make the minor a party, although they desired to get a decision declaring his adoption invalid: and they are themselves greatly to blame for the present condition of the suits. Then there is no doubt that a variety of very substantial issues arise on behalf of the minor. Most of these are indicated in the written statements which have been put in, and they all require careful consideration. For example, what is the precise effect of Section 74 of Act IV (B.C.) of 1870? The words used are peculiar: "no adoption, &c., is to be deemed valid,"—but they are not new, for they occur in Section 33 of Regulation X of 1793, although under that Regulation the consent of the Court of Wards only was required. Then what is the effect of Rithbunjun's assent to the adoption? Can the plaintiffs attack this estate and put the minor to proof of his title when Rithbunjun says he has no interest in the property and supports the adoption? These and many other questions will have to be considered.

We have gone into these details in the hope of, by so doing, checking in some degree such looseness and irregularity of procedure as has been indulged in by all parties,—a looseness and irregularity which have the effect of rendering the whole litigation nugatory up to the present moment.

The suits are all remanded; and in no event is the Court of Wards, or Abdool Hye, entitled to recover from the plaintiffs any costs incurred up to the present time.

[PRIVY COUNCIL JUDGMENT.]

The 12th February 1875.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

Enhancement of Rent—Dependent Talooks—Reg. VIII of 1793 s. 51—Act X of 1859 ss. 15 & 17.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Hurronath Roy and others

versus

Gobind Chunder Dutt.

A suit brought to recover rent on account of a dependent talook at an enhanced rate after notice, was decreed by the Collector. The case came in appeal before the High Court, who thought that the rent admittedly never having varied, the defendant was protected from enhancement under Act X of 1859 s. 15. Plaintiff appealed to the Privy Council pleading grounds upon which the rent of ryots having rights of occupancy, were liable to enhancement under s. 17:

HELD that these grounds were not applicable to a dependent talook created before the decennial settlement; such talooks being protected from enhancement by Reg. VIII of 1793 s. 51, except under the circumstances therein mentioned.

HELD that even a dependent talookdar who, under the provisions of that Section (51), might otherwise be liable to enhancement, was exempted by Act X of 1859 s. 15, if he held his tenure otherwise than under a terminable lease and at a fixed rent which had not been changed from the time of the permanent settlement.

---

* From the judgment of Jackson and Phear, JJ., decided on the 15th January 1866.

Digitized by Google

Held that as these conditions were satisfied in the case of this talook, it was protected from enhancement; for although a decree of the Sudder Court of 1821 had declared that the jumma should be fixed at pergunnah rates, and a decree of 1860 construed the earlier decree as declaring that plaintiff was entitled to enhance, the rent never was assessed at pergunnah rates, and never was enhanced.

THIS was a suit brought to recover rent at an enhanced rate after notice of enhancement for Turuf Oomedpore, a dependent talook comprised within the plaintiff's three annas and four gundas share of the zemindaree Pergunnah Mahomedshahee in Zillah Jessore. The suit was brought in the Revenue Court under Act X of 1859. The Collector who tried the case thought that the rent ought to be enhanced, and he decreed accordingly. He says:—"The case has been pending "since 1862, when the issues were first "fixed after hearing the pleadings on both "sides. I come to the conclusion that the "only issue on which there is any dispute "between the parties is that first laid down, "viz., whether the provisions of Sections 15 "and 16 Act X of 1859 do not apply to "the talook regarding the rents of which "the present suit is brought, and whether "the rent under these circumstances can be "enhanced. Defendant's mooktear admits "the fairness of the pergunnah rates "assessed, but bases all his resistance to the "paying of the enhanced rent on the princi- "ple above mentioned. I do not think there "can be any doubt that the rent can be "enhanced under the power conveyed in "the two decisions above quoted" (referring to two decisions of the Sudder Court of the 30th April 1821 and of the 11th December 1860 respectively, which will be considered presently). The Collector proceeds:—"It is "distinctly laid down there that the rents of "Talook Oomedpore may be enhanced by "the plaintiff after issuing the notices "required by law at the pergunnah rates, and "in the face of these decisions of the "highest judicial authorities, I cannot see "that the plea of defendant can for a "moment be entertained. I accordingly "reject it."

The case came on appeal before the High Court, who thought that the main question was whether, under the circumstances, the rent admittedly never having varied, the talookdar was not now protected by Section 15 Act X of 1859, and desired that the argument might be confined to this point, and having heard both parties upon it, were of opinion that, under the provisions of the 15th Section of Act X of 1859, the defendant was protected from enhancement, and they decreed accordingly.

The present appeal is against that decision, and the question is whether the plaintiffs are entitled to enhance the rent in the manner in which they claim to enhance it. The notice of enhancement is this:—"Be "it known that in the three annas and four "gundas share of Pergunnah Mahomedshahee "our zemindaree, the 37 mouzahs with hoo- "dahs julkur, &c., of Turuf Oomedpore, on a "jumma of Rs. 8,346-14-4 without settle- "ment, and liable to increase or decrease, "used to be recorded in the name of the late "Baboo Nil Comul Pal Chowdhry. On a "survey of the lands of the said jumma, the "same has been shown to comprise 26,236 "beegahs and 8 cottahs of land, and after "deduction of 1,041 beegahs and 3 cottahs "on account of ghur-lack (unculturable), "khal khonduck (ditches, &c.), a net area "of 25,196 beegahs and 5 cottahs at the "prevailing pergunnah rate was assessed at "Rs. 36,001-11-8, and a notice having been "served accordingly, and a suit No. 63 "of 1855 brought for assessment of the said "jumma in the Court of the Principal "Sudder Ameen of this zillah. On an "appeal preferred by us, the Judges of the "Sudder Court, on the 11th of December "1860 (referring to the decree in the former "suit), declared that the said mehal was "liable to assessment, in accordance with "the decision of the Zillah Court, after "service of notice, therefore, as there is in "your possession an excess of land on a "deficient jumma, and the productive powers "of that land have increased, we conse- "quently serve you with this notice, under "the provisions of Section 13 of Act X "of 1859, for the purpose of getting from "you from the year 1269 the rents of 25,196 "beegahs and 5 cottahs out of 26,236 "beegahs and 8 cottahs of land, less 1,041 "beegahs and 3 cottahs of unculturable "ditch, waste land, &c., comprised within "the 37 mouzahs and hoodahs, with "julkurs of the aforesaid Turuf Oomedpore, "by assessment thereof at the prevailing "pergunnah rates." Therefore, the ground upon which the plaintiff seeks to enhance the rent is, that there is in the defendant's possession an excess of land on a deficient jumma, and that the productive powers of that land have increased.

Those are grounds, though not accurately expressed, upon which the rents of ryots having rights of occupancy are liable to enhancement under Section 17 Act X of

Digitized by Google

1859, but they are not applicable to a dependent talook like the present, which was created before the decennial settlement. Talooks of that description are protected by Section 51 Regulation VIII of 1793 from enhancement, except under the circumstances therein mentioned; see also Regulation XLIV of 1793 Section 7. The decree of the Collector, therefore, could not be supported even if the rent of the talook were liable to enhancement under the provisions of Section 51 of Regulation VIII of 1793.

It may, however, be well to consider whether the High Court was right in holding that the defendant was by Section 15 of Act X of 1859 protected from enhancement in any case and upon any grounds. Section 15 says:—"No dependent talookdar, or other "person possessing a permanent transferable "interest in land intermediate between the "proprietor of an estate and the ryots, who, "in the provinces of Bengal, Behar, Orissa, "and Benares, holds his talook or tenure "(otherwise than under a terminable lease) "at a fixed rent which has not been changed "from the time of the permanent settlement, "shall be liable to any enhancement of such "rent, anything in Section 51 Regulation "VIII of 1793, or in any law to the contrary "notwithstanding." To bring the case within that Section, he must hold his tenure otherwise than under a terminable lease, and he must also hold at a fixed rent, which has not been changed from the time of the permanent settlement. It should be remarked that Section 15 does not render liable to enhancement dependent talookdars, who were exempted by Section 51 Regulation VIII of 1793, but exempts from enhancement, amongst others, dependent talookdars who, under the provisions of that Section, might otherwise be liable to enhancement.

Now the first question is, did the defendant in this case hold at a fixed rent? Proceedings which have been taken from time to time between parties who were represented by the parties in the present suit, the zemindar on the one side, and the owner of the talook on the other, have been put in evidence. The first decision to which it is important to refer is that of the 30th May 1811. That was a suit brought by Rajender Deb Roy, the then talookdar, against, amongst other defendants, Kishen Mohun Banerjee, who derived his title to the zemindaree through a purchase at a sale in execution of a decree of the Supreme Court of Calcutta in the month of Srabun 1207, and who also claimed Turuf Oomedpore under the same purchase. The plaintiff claimed the talook under a gift from his father, the former zemindar, dated the 27th Bysack 1195, before the date of the sale in execution. The Zillah Judge, acting upon the bill of sale of the Supreme Court, dismissed the plaintiff's suit. The plaintiff thereupon appealed to the Provincial Court of Calcutta, and filed the deed of gift from his father dated the 27th Bysack 1195. The case was heard in the first instance by the second Judge, who held that although Kishen Mohun Banerjee purchased the zemindaree rights of the former zemindar, yet the talookdaree rights of the appellant could not be destroyed, and under those circumstances it was his opinion that the decision of the Zillah Judge was wrong and should be reversed, and that the appellant should pay to the respondent the rents of the talook as he did to the former zemindar at the rates of the tahoot of the decennial settlement. The case afterwards came up in the Court of the first Judge, who agreed with the second Judge, and a decree was accordingly passed as follows:—"The first and second Judges, having agreed in their judgment that the "decision of the Zillah Court should be "reversed, and that talook Turuf Oomedpore "be declared as the right of the appellant "in the manner of a mofussil talook, there-"fore it was ordered that the decision of Mr. "James Devienne Thourne, acting Judge of "the Civil Court of the above zillah, dated "the 21st of March of the year 1808, be "reversed and set aside; and that the appel-"lant having been put and maintained in "possession of the turuf aforesaid, do pay "the rents thereof to the respondent Kishen "Mohun Banerjee, in accordance with the "amount laid down in the tahoot of the "decennial settlement, which the appellant "used to pay to the former zemindar;" see Record, pp. 32 to 35. Now the rent is there treated as a fixed rent, which the defendant talookdar used to pay to the zemindar.

That decree having been passed in the year 1811, a suit was commenced on the 17th September 1812 by the then zemindars, Petumber Ghose and Kishen Mohun Banerjee, against Mohesh Chunder Deb Roy, minor son of Rajender Deb Roy, and against Ramender Deb Roy, guardian of the above minor in the Court of Zillah Jessore, for the recovery of Rs. 1,443-3-12, alleged to be due for arrears of rent, upon the following allegation, *viz.*, that having purchased the three annas and four gundas share of Pergunnah Mahomedshahee, &c., the zemindaree of

Digitized by Google

Gobind Deb Roy, they went on paying year by year the sum of Rs. 9,268-8-1-1 sicca, the jumma of the above. That on the 30th of the month of May of the year 1811 A.D., by a decision of the Judges of the Provincial Court, the talooks aforesaid were decreed as the right of Rajender Deb Roy as his mofussil talook. After the death of the aforesaid, the defendants had possession, and when we called for from them the sum aforesaid, being the jumma as per tahoot, which was the proper rental, they, out of the jumma of the decennial settlement, acknowledged only the sum of Rs. 7,825-4-8-1 sicca. But as out of the total of jumma claimed after deduction of the amount of jumma acknowledged by the defendants a sum of Rs. 1,443-3-13 remains due, we therefore institute a miscellaneous suit in the Zillah Court for the recovery of the rent at the rates of the decennial settlement. This appears from the decree of the Sudder Court of the 30th April 1821. It also appears from the said decree that on the 23rd of December 1813 the acting Judge of the Zillah Court, on all the grounds stated in his decision, and in accordance with the decision of the Provincial Court, dated the 30th of May 1811, already referred to, ordered,—"that the said suit be decreed, "and that the defendants were to pay to, "the plaintiffs year by year the sum of "Rs. 9,268-8 as the rents of the said talook." The defendants preferred an appeal to the Provincial Court, and that Court, in accordance with a judgment of an appointed Judge of the Court that the former owner of the zemindaree had before the decennial settlement, made over the talook at a yearly jumma of Rs. 7,825-4-8-1 sicca, ordered,—"that "the decision of the acting Judge of Zillah "Jessore, dated the 23rd of December 1813, "be reversed and quashed, and that the costs "of both Courts be borne by the respondents."

The case came before the Sudder Court on special appeal from the Provincial Court. In their decree dated the 30th April 1821 they state that, amongst other documents, "two papers were put in, *viz.*, on the part "of the plaintiffs, a dhol of the decennial "settlement for the year 1197, showing the "jumma of Turuf Oomedpore at the sum "mentioned in the plaintiff's plaint; and, on "the part of the defendants, a hustabood "paper of the year 1197 B., showing a "decrease of the jumma recorded in the "heba, and fixing it, after deduction of "improper abwabs, at the sum of Rs. 7,631." They then proceed:—"In the opinion of "this Court, after examination of those two "documents, they are held to be unworthy "of credit or reliance, because the document "filed by the plaintiff being alleged to be a "document from the Collector's office, does "not bear the signature or initials of any "Government officer, and although on the "second document there appears to be the "initials of the Collector's name, yet his "name is not even mentioned in the said "hustabood, and therefore none of those "documents appear sufficient to determine "the amount of jumma on the talooks of "the settlement of that year. In short, the "amount of jumma of the disputed talooks, "as alleged by both parties, has not been "proved by them before this Court; and "the decision of the Provincial Court as to "the amount it maintains for those talooks "by rejecting the claim of the plaintiffs "should be confirmed, as the parties do not "agree as to the amount of jumma of those "talooks between them; under those circumstances, for the purpose of putting an "end to quarrels and disputes between the "parties, suits have been instituted for a "very long time, that is, from the time of "institution of the old suit and of the new "one, about the jumma of the disputed "talooks in the Zillah and in this Court. "The order of the Court is that the jumma "of Talook Oomedpore be fixed according to "pergunnah rates, and in accordance with "the rules laid down in Section 8 Regulation V of 1812." Not that the jumma shall be enhanced, but that there being a dispute between the parties as to what was the amount of the jumma, it shall be fixed according to pergunnah rates, &c. They thought that it ought to be paid according to pergunnah rates, because they could not ascertain what was the actual amount of the rent; but they did not assess the rent or fix by their decree the amount to be paid for arrears; nor did they order the rent to be enhanced. The suit was not for the purpose of enhancing the rent, but a miscellaneous suit for recovering arrears. This Committee has already pointed out in a former case of Gopal Lall, which was cited in argument, that there is a great distinction between a suit to enhance and a suit to recover arrears. They there say:—"Their Lordships are of opinion that "a suit to enhance is very different from a "suit to recover arrears of rent at the rate "originally fixed, and that it is founded "entirely upon different principles. To a "suit for enhancement it will be no bar to "plead that all arrears according to the "original rate have been paid."

Digitized by Google

The zemindar acting upon that decision of the Sudder Court, subsequently brought a suit to enhance the rent. We have not the decree of the Court, but we have a reference to it in the 22nd volume of the printed decisions of the Sudder Court, of the 11th of December 1860. The Court says :—"This suit was brought to enhance "the rents of Talook Oomedpore, upon a "given measurement and pergunnah rates, "on the averment that the said talook con- "stituted an under-tenure, comprised in the "plaintiff's three annas and four gundas share "of Turuf Mahomedshahee, purchased by him "at an auction sale, held by order of the Mas- "ter in Equity of the Supreme Court." It is to be observed that it was purchased, not under a sale for arrears of revenue, but in execution of a decree. Then they proceed to state what the different contentions were, and they finally come to this conclusion :— "As then it is evident that Gobind Chunder "Dutt, who purchased the right of Issur- "chunder, the mortgagee proprietor, is "entitled to be regarded as talookdar of the "entire turuf of Oomedpore, and as it is "nowhere pleaded that notice of enhance- "ment has been served upon him, the decree "in plaintiff's favor giving him the "authority to assess must be subject to "plaintiff's serving the notice required by "the law. The present order, therefore, "will, under the peculiar circumstances of "the case, merely be to the recognition of "plaintiff's right to assess after proper "service of notice on the proper parties." Probably they used the word "assess" instead of "enhance," and intended to declare that the plaintiff had a right to enhance upon service of the proper notice. After that decision had been pronounced, an application was made to the Court to review their judgment. The Court say :—"Now "it is urged through the present petition, "and it is objected in Court, that if the "decree of the year 1821 confers on the "plaintiff the power to assess, the conten- "tion now arises, what rates is the plaint- "iff entitled to obtain on such re-assessment "of the rental. It has been urged that in "the case decided in the Sudder Court in "the year 1821, the former owner in that "case had merely based his right for assess- "ment at an increased rental on the follow- "ing grounds :—That the rents of the said "lands should be of an amount equal to the "amount of sudder jumma of the zemin- "daries, that is, that it should be Rs. 9,400, "and the talookdar had pleaded in reference "thereto that he could remain in possession "of the mokurruree (fixed) rental of Rs. "7,400 ; consequently, in the above suit the "only point at issue was whether the *owner* "of the property could enhance the rent "to Rs. 9,400, or whether the talookdar "was entitled to remain in possession on "the jumma of Rs. 7,400." Then they say :—"Mr. Peterson now asks that an "enhancement be decreed in our decision in "accordance with the increase granted in the "old suit. Our judgment is, that as the "Court had merely decided that the plaintiff "could enhance after service of the neces- "sary notices on the tenants, and therefore "the present contention as to the amount of "enhancement which will have to be fixed "in accordance with other rates as above "mentioned, belong to another subject. And "after service of the notices above men- "tioned upon the tenant, it will then be "time to decide that question." Therefore, the Court proceeding on the decree of 1821 declared that the plaintiff was entitled to enhance, but refused to decide to what extent the enhancement could be made, and left that question, involving the construction of the decree of 1821, open for decision after notice of enhancement should have been served.

Now, it does not appear that either after the decree of the 30th April 1821, or after that of the 11th December 1860, the defendant or those under whom he claims ever paid a higher rent than Sa. Rs. 7,825 odd, or 8,346 odd, the corresponding amount in Company's rupees, or that the plaintiffs or the zemindars under whom they claim ever obtained a decree for arrears assessed at a higher rate ; on the contrary, it appears that after the decree of 1821 and before that of December 1860, *viz.*, on the 22nd March 1827, a farmer of the zemindaree sued for and obtained a decree against the talookdar for arrears of rent at the rate of Sa. Rs. 7,825 odd, the jumma which he stated was acknowledged by the talookdar (Record, p. 47). In his plaint in that suit he says the talook was the talook of Rajender Deb Roy ; that after his death Mohesh Chunder Roy, having come into possession by right of inheritance without any settlement as to the jumma, used to pay me the sum of Rs. 7,825-4-8½ as the yearly rental acknowledged by him (p. 46).

On the 19th August 1847 a similar decree for arrears was obtained, the jumma of the talook being stated to be Co.'s Rs. 8,346 odd (p. 63).

Digitized by Google

On the 31st March 1848 there was a similar decree for arrears recovered by the zemindar, who, in his plaint, stated that the talook was recorded in the name of the defendants, liable to increase or decrease, at the rent of Co.'s Rs. 8,346 odd (p. 65).

Numerous other decrees were obtained by the zemindars against the talookdars for arrears of rent between 1826 and 1860, either at the rate of Sa. Rs. 7,825 odd, or at the corresponding rate of Co.'s Rs. 8,346 (see Record, pages 45 to 74).

It appears, therefore, to their Lordships that there was ample evidence, independently of any presumption arising under Act X of 1859 Section 16, to prove that the talook was held at a fixed rent, and that such rent had not been changed from the time of the permanent settlement. The rent was not changed by the decree of 1821, for whether right or wrong, it at most amounted to a declaratory decree that the jumma should be fixed at pergunnah rates; or, according to the construction put upon it by the decree of 1860, that the plaintiff was entitled to enhance. The rent never was assessed at pergunnah rates, and never was enhanced. Besides, there is the statement in the judgment of the High Court that the rent had admittedly never varied.

We have been referred to the case of Nuffer Chunder Paul Chowdhry and another *v.* Poulson,* decided by this Committee on the 24th January 1873. It appears to their Lordships that that is quite a different case from the present. That was the case of a mokurrureee tenure, and it was proved that it was created as late as 1824. Their Lordships say:—"It should be stated that "this suit was decided before Act X, to "which reference has been made, came into "operation. The state of the law then was "that he could defend himself by showing "an ancient tenure going back twelve years "before the decennial settlement; but he "made no case of the kind. He made a "case of mokurrureee tenure established by "pottahs in 1824." The fact that those pottahs were created in 1824, long since the time of the permanent settlement, rebutted the presumption that the tenure had been held from the time of the permanent settlement.

Our attention has been called by the learned Counsel for the appellant to the following paragraph in the judgment in that case:—"In their Lordships' opinion the "defendant did establish that the rent at "which the talook was held had not been "changed for a period of twenty years before "the commencement of this suit, and that he "thereby cast upon the plaintiff the burden "of showing 'the contrary' (in the words "of the Act), or that the rent had been fixed "at some later period; and their Lordships "are of opinion that the plaintiff has succeeded in proving that which was cast "upon him to prove." But that opinion merely goes to the effect that proof that the pottahs were created subsequently to the permanent settlement rebutted the presumption created by the 16th Section of Act X of 1859, that the tenure had been held at a uniform rent from the time of the permanent settlement.

It should be remarked that a rent may be a fixed rent though liable under certain conditions to be enhanced. That position is fully borne out by Section 15 Act X of 1859. The Section does not merely say that the tenures therein described shall not be liable to enhancement "if held at a fixed rent," but "if held at a fixed rent which has not been changed from the time of the permanent settlement." If the mere fact of holding at a fixed rent was a bar to enhancement, the Section would have been unnecessary. The term "fixed rent" in that Section cannot mean a rent so permanently fixed that it cannot be enhanced under any circumstances.

It is unnecessary to determine what would have been the effect of the decrees of 1821 and 1860, so long as they were unreversed, if Act X of 1859 had not been passed. Their Lordships concur entirely with the High Court that the effect of those decrees did not put the plaintiffs in a better possession than other landlords who, previously to the passing of Act X, had a good right to enhance, but whose right, if not exercised from the time of the permanent settlement, was taken away by the 15th Section of that Act.

Upon the whole, their Lordships are of opinion that the High Court came to a correct conclusion in holding that the rent was not liable to enhancement, and they will humbly recommend Her Majesty that the decree of the High Court be affirmed, and the appeal dismissed with costs.

There is another appeal which was consolidated with this. The recommendation to Her Majesty will be the same in both cases.

The appellants will pay the costs of both appeals.

* 19 W. R., 175.

Digitized by Google

[PRIVY COUNCIL JUDGMENT.]

The 13th February 1875.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

Possession—Certificate—Benamee—Act VIII of 1859 s. 260—Principal and Agent Execution Sale.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Lokhee Narain Roy Chowdhry and others

versus

Kallypuddo Bandopadhya and others.

In a suit for possession brought by the holder of a certificate of purchase of property sold at an execution sale, it is open to the real owner if in possession (Act VIII of 1859 s. 260, notwithstanding) to show that plaintiff is the apparent owner only (benameedar) and a mere trustee.

Where a man steps in during an auction sale and assumes the character of a principal agent, and deposing another who is really acting as agent purchases the property, he cannot afterwards be allowed, in equity, to turn round and claim to have purchased not for the principal but for himself, and to obtain a profit out of his purchase.

THIS suit was brought by the widow and two sons of Ishan Chunder Banerjee against Baboo Lokhee Narain Roy, to recover possession of a nine annas share of the zemindaree called Kishenpoora. The case set up in the plaint was that the nine annas had been purchased at an auction sale held in execution of a decree obtained against a lady of the name of Monmoheenee Daben, and that the certificate of purchase was given to Ishan Chunder; and it is alleged that Lokhee Narain Roy obtained forcible possession of the nine annas subsequently to the certificate of sale. The defence was that Ishan Chunder was the manager of Lokhee Narain, and had purchased the nine annas benamee for him. It appears that Lokhee Narain is himself the owner of seven annas of the zemindaree, and that Monmoheenee was the owner, for life only, of the other nine annas; and that it was her life interest which was sold. It would seem also that Lokhee Narain claims the reversionary interest after Monmoheenee's death in those nine annas.

The Judge in settling the issues refused to lay down any issue upon the question whether the purchase was benamee or not, in consequence of a decision of the Full Bench of the High Court of Calcutta which had determined that it could not be shown against the holder of a certificate of sale under an execution that he purchased benamee for another, whether the suit was brought by any person against him, or was brought by such holder himself as plaintiff. The Section of the Code of Civil Procedure upon which the question turned is Section 260, and the words applicable to the question are these:—"And any suit brought "against the certified purchaser on the "ground that a purchase was made on behalf "of any person not the certified purchaser, "though by agreement the name of the pur- "chaser was used, shall be dismissed with "costs." It was held by this Committee in appeal from the case referred to,—the case of Mussamut Buhuns Kowur *v.* Beharee Lall, reported in the 14th Moore, p. 496, that this Section should be construed strictly and literally, and was applicable only to a suit brought against the certified purchaser to assert the benamee title against him, that the statute did not make benamee purchases illegal, and that the real owner for whom the purchase was made, if in possession, and if that possession had been honestly obtained, might defend a suit brought by the holder of the certificate and show that he was the apparent owner only and a mere trustee. However, these issues being settled before the case had been decided on appeal, the Judge of course felt bound by the decision of the full Court and settled the following issues only:—"First, is the defendant in "possession of the disputed share of "the zemindaree under circumstances "which amount to a transfer to him of "the title which the plaintiffs derived from "their purchase (made by Ishan Chunder "Banerjee)? If not, can the plaintiffs "obtain the relief sought for, and, if in "possession, under such circumstances, can "the defendant's possession be disturbed?" The Judge adds the note:—"The plea set up "by the defendant, that the plaintiff's father "had purchased the property in question "benamee for defendant's benefit, and with "his money, was not allowed under the Full "Bench Ruling of 12th November 1868."

In Mussamut Buhuns Kowur *v.* Beharee Lall, it was stated in the judgment of the

* From the judgment of Kemp and Paul, JJ., decided on the 19th December 1870.

Digitized by Google

High Court that if the certified purchaser was really benameedar, or a trustee for another person, and after the certificate of sale did some fresh act to put the real purchaser into possession, that might operate as a transfer of the property to him. They say :—"If a person who has gained a title "by limitation waives that title in favor of "the real owner, and gives up possession to "him as the rightful owner, such act would "probably be held to amount to a waiver of "the right which he had gained by limit-"ation, and to confer it upon the real owner. "In like manner, if a benameedar should "acknowledge the purchase to have been "made benamee, and waive the right con-"ferred upon him by Sections 259 and 260, "and give up possession to the real pur-"chaser as the rightful owner, such act "would probably amount to a transfer of "the title as well as of the possession to the "real purchaser." This passage in the judgment was the authority under which the Judge laid down the two issues. It is obvious that in the decision of those issues it becomes material to inquire under what circumstances possession was given by one party to the other, and whether by reason of the antecedent relation between the parties it was *meant* to operate as a transfer of the property. Therefore the relation of the parties, whether they really were benameedar and beneficial owner, was very proper to be enquired into and tried upon the issue in fact laid down ; and accordingly the Judge of the Court of Cuttack, having taken evidence as to the sale and the circumstances under which it was made, proceeded to give his opinion upon the question whether the purchase was made by Ishan Chunder on his own behalf, or as the manager and on behalf of Lokhee Narain.

A good deal of evidence was given upon that question, but the learned Judge seems to have rested his decision entirely upon two witnesses, and resting his decision upon those witnesses he came to the conclusion that the purchase had been made by Ishan Chunder on his own account and with his own funds. He says :—"It is proved from the "evidence of two of the most trustworthy of "their witnesses, both of them native gentle-"men, whose evidence is entitled to the "fullest belief, *viz*, Kanie Lall Pundit and "Baboo Mohun Persad Roy, that the pur-"chase of the zemindaree in dispute was "made by Ishan Chunder on his own "account and with his own funds." Their Lordships will refer to that evidence presently, but it seems to them that the learned Judge has drawn too broad a conclusion from the facts which they proved. On the case coming before the High Court, the Judges seemed to think that it was unnecessary to go into the facts. They thought themselves bound by the decision of the full Court, and that they could not enquire into the transaction of the sale, whether it was benamee or not, and so tying their hands they came to the conclusion that what was done after the sale did not amount to a transfer of the property from Ishan Chunder to Lokhee Narain. Their judgment proceeds on those short grounds.

As the law at present stands, it is open for their Lordships to consider what was the real state of the case between these parties, and whether or no this purchase was made by Ishan Chunder on his own account, or on behalf of Lokhee Narain.

It is right to see in the first place what was the relation between the parties. It is plain, and indeed is not denied, that Ishan Chunder had been for a period of about a year the manager of this zemindar, Lokhee Narain, and had the possession and management of some at least of his funds. It seems that a month only before this sale, he had advanced a sum of Rs. 4,400 to this lady Monmoheenee upon a mortgage bond. That bond was taken in his own name, but it is admitted by the plaintiffs that the bond, although taken in his own name, was in respect of an advance out of Lokhee Narain's money, and that he held the bond on behalf of, and as benameedar for, Lokhee Narain. The transaction of this sale followed soon after. The lady appears to have been in difficulties. A creditor obtained a judgment against her, and there was to be a sale in execution of her life interest in nine annas of an estate in which Lokhee Narain held the other seven in his own right, and a reversionary interest in the nine that were sold. It would be a very proper thing for his general manager, to look after that sale and see whether he could make an advantageous purchase for him.

It seems to be a fair conclusion from the evidence that Ishan Chunder had no express instructions previous to the sale from Lokhee Narain to purchase these nine annas for him. But these facts are proved, that Russool, who was an agent, or acting at that time as an agent, of Lokhee Narain, was a bidder for these nine annas, and had bid Rs. 2,260 for the property. At that stage, when he had given that bidding which was the last

Digitized by Google

of four, somebody suggested to him that he ought not to bid for the zemindar, but that Ishan Chunder, the manager, was the proper person to purchase the property for Lokhee Narain. Accordingly, the evidence is that Ishan Chunder was called into the room, the state of the biddings made known to him, and then he made upon the last bidding of Russool the small advance of Rs. 2. If the witnesses are believed, he took the bidding out of Russool's hands, who was professing to act for Lokhee Narain, saying at the time, or shortly after, that he purchased for Lokhee Narain. No doubt, that depends upon the credit due to the witnesses, but there are circumstances in the case which corroborate them. There is the undoubted relation in which Ishan Chunder stood to the zemindar; the facts, also, that Russool bid no more, and the very small advance upon his previous bidding, seem to show that there was an understanding between the two agents, otherwise it is very unlikely that that small advance should have stopped the biddings, and that the property should have been knocked down at that point.

But not only do the circumstances attending the bidding at the sale give corroboration to the story, but the subsequent conduct of Ishan Chunder is inconsistent with his having purchased on his own account, and is entirely consistent with the view that he purchased on behalf of the zemindar for whom he was acting as manager. The possession is one of the real facts in the case about which there can be little dispute. It is not pretended that Ishan Chunder or his sons after his death obtained anything more than formal possession by the officer of the Court. They obtained that formal possession. How did they lose it? They assert in their plaint, and for a purpose, that Lokhee Narain took forcible possession. There is not the slightest evidence of it, and it is conceded now that nothing like forcible possession was or could be taken. But what is proved is this, —by two ryots who appear to have no interest one way or the other,—that they went to Ishan Chunder, hearing that he was the auction purchaser, to pay their rents. One of them says he went to him in the first place and was told by him to go to Lokhee Narain and pay it. The other says that he went first of all to Lokhee Narain, who told him that Ishan Chunder was the auction purchaser. He went to him, and Ishan Chunder said, It is true I am the auction purchaser, but the rents are payable to Lokhee Narain. There is beyond that the fact that Lokhee Narain received the rents from those two ryots, and therefore was in possession so far as possession can be obtained of property which is in the hands of ryots.

He also paid the Government revenue. The petitions he presented to the Collector have been relied upon by the plaintiffs as showing that he did not then put forward his own title. He made no allusion to it in either of the petitions, and in the second petition he put forward Ishan Chunder as the owner of the property. It is perfectly well known to be a common practice in India where property is in the name of a man, although not the true owner, that all the proceedings as far as the Government is concerned take place in his name. All that Lokhee Narain then wanted to do was to pay the Government revenue, so that the estate should be in no danger of being forfeited. Their Lordships think that no very strong inference can be drawn against him from the fact that in the petition he states the title according to what it ostensibly was. It is stated by several witnesses that before Ishan Chunder left Cuttack to go to Calcutta, he promised Lokhee Narain to give him a kobala for the property, saying:—"There is "no immediate haste about it; you are in "possession; it shall be done when I return." He went to Calcutta and died there. His sons returned to Cuttack, and then made a claim to the property upon the ground that Ishan Chunder had purchased it for himself and out of his own funds. The question having arisen, the parties very sensibly called a punchayet to decide the matter between them and three or four respectable persons appear to have assembled and to have heard the whole case. They came to the conclusion that Lokhee Narain ought to have the estate, but they also appear to have thought that Ishan Chunder had not funds in his hands sufficient to pay the purchase money unless he had realized Monmoheenee's bond. Probably, the amount was not immediately available, and they directed that the bond should be given up by the sons to Lokhee Narain, having no doubt that it was a benamee transaction, and that the sons should convey the nine annas to the zemindar, on his paying Rs. 2,800, which is the purchase money and interest with a small sum for profit, the sons having contended that their father bought in order to sell again at a profit.

Now it is as well at this point to refer to the evidence of Kanie Lall, the pundit, on which the Judge of Cuttack relied for the

Digitized by Google

conclusion to which he came. That witness says :—"Before the arrival of the plaintiffs "from Calcutta, Lokhee Narain Roy Chow-"dhry said that the zemindaree of Kishen-"poora had been purchased benamee in "the name of Ishan Baboo, on which I "replied that we shall know this when the son "of Ishan Baboo arrives from Calcutta. "Afterwards, when Kallypuddo, the said son "of Ishan came from Calcutta, he was one "day called to the presence of Lokhee "Narain Roy Chowdhry, and he said that "the said zemindaree was purchased by his "father, and if a profit were allowed to him, "he would execute a kobala. This took "place in my house at the time;" several persons, mentioning them, "were present. "I do not recollect who besides these were "present. The Baboo (Ishan) had requested "me and Shodanund Mohapatter and Mokoond "Persad Roy to take care of his property "before he left." These two persons, then, one the pundit, were to take possession and manage Ishan Chunder's property in his absence. It might be expected that they would receive rent and pay the Government revenue if the estate had really belonged to Ishan Chunder. He goes on :—"After his "death, according to a letter written by his "son Kallypuddo, we continued to take care "of his property. We were assembled there "with the object of coming to a settlement "in respect of this Kishenpoora zemindaree." He says the mooktears of both parties were present, and goes on thus :—"We arranged "that Lokhee Narain was to pay the pur-"chase money, together with interest from "the date of purchase at the rate of one "per cent. per mensem. Kallypuddo said "that he would take a profit of Rs. 1,000, "and the Chowdhry said, 'I will give "'Rs. 300 as profit.' On that Kallypuddo "said, that he would consider and give his "answer early next morning. This was "what passed on that occasion. At the time "of attempting a settlement the Chowdhry "said that he would pay Rs. 2,800. The "next day the Chowdhry sent me a sum of "money, but I did not count how much." However, there is no doubt the money was sent. Then it appears that one of the sons intimated that in consequence of some advice he had received from his mother, he would not assent to the arrangement, nor would she; and so it appears to have gone off. The other witness, Shodanund Mohapatter, states the award still more explicitly. He says :—"The arrangement was to the effect that "when the sum of Rs. 2,800, together with "the stamp for the kobala, was deposited "with Kanie Lall Pundit, Kallypuddo, and "Shamapuddo should execute a kobala."

The award of the punchayet is really consistent with the case of Lokhee Narain. They evidently came to the conclusion that Ishan Chunder had not funds in his hands sufficient to pay the purchase money, but they thought that Lokhee Narain ought to have the estate, and they accordingly made an award, that he was to have the estate, and the others the purchase money, allowing, probably by way of compromise, a small profit over.

Their Lordships, therefore, upon the whole matter, think that although Ishan Chunder may have had no previous instructions to purchase from Lokhee Narain, yet that being his manager and finding himself at this sale he purchased for him, after having stopped Russool, who was there before him bidding for the zemindar, in that operation. It would be contrary to equity to allow a man who steps in and assumes the character of a principal agent, and deposes another who was really acting as agent, afterwards to turn round and say, I purchased the estate not for the principal but for myself, and to obtain a profit out of the estate he had so purchased. Ishan Chunder himself does not appear to have intended to act in this manner, because, as already observed, he gave possession of the estate to the zemindar, by directing the tenants to pay their rents to him, and does not appear to have interfered in any manner inconsistent with the character he took upon himself at the sale—the character of a manager for the zemindar.

Under these circumstances, their Lordships think that the judgments of the Courts below cannot be sustained, but they are anxious that the whole question between these parties should be determined without further litigation. In their view, the parties having agreed to submit to the award of arbitrators, it is right and equitable that if the estate is maintained in the zemindar Lokhee Narain's hands, he should pay to the representatives of Ishan Chunder the Rs. 2,800 which the arbitrators thought was the proper sum to be paid to them, together with interest thereon. It is difficult to fix the precise date from which the interest should run, but their Lordships think it is equitable the respondents should receive interest for six years at six per centum per annum, making the sum of Rs. 1,008 for interest. Their Lordships are desirous to secure the execution of this arrangement,

Digitized by Google

and they will therefore humbly recommend Her Majesty to reverse the decrees below, and to direct that in case the appellant pays into Court within six months the sum of Rs. 3,808 (being the Rs. 2,800 and interest thereon as aforesaid), the respondents be at liberty to take such sum out of Court upon executing a kobala of the property to the appellant, the stamp of which is to be paid by the appellant, and that upon such payment into Court being made, the suit be dismissed, and the respondents do pay to the appellant the costs of the litigation in India and of this appeal.

That in case the appellant does not pay the above amount into Court, the suit at the end of the said six months be dismissed, but in that case, without any order as to the costs in India or of this appeal, and without prejudice to the right of the respondents to retain the certificate of sale, and to take such proceedings as they may be advised to recover any monies due to them from the appellant in respect of the purchase of the said property or otherwise.

The 6 h March 1875.

Present :

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Arrears of Rent—Procedure under Act VII of 1868—*Collector's Powers—Act IV (B.C.) of* 1870 *s. 75—Reg. VI of* 1822.

Case No. 879 of 1874.

Special Appeal from a decision passed by the 1st Subordinate Judge of Chittagong, dated the 24th January 1874, *reversing a decision of the Moonsiff of Satkania, dated the 15th September* 1873.

Kala Bibee (Plaintiff) *Appellant,*

versus

The Collector of Chittagong and others (Defendants) *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Unnoda Pershad Banerjee for Respondents.

In a suit by the Collector to recover rent due on account of a tenure in an estate belonging to a ward of Court, which tenure the defendant had held under the minor's father:

HELD by Markby, J. (Mitter, J., *dissentiente*), that the Collector had no power to take proceedings under Act VII of 1868, as both Act IV (B.C.) of 1870 s. 75 and Regulation VI of 1822 apply only to tenures which the Collector has himself created during his management under his powers as manager, and the defendant's tenure could not be accurately described as held from the Collector.

Judgment passed on the 21st December 1874.

Markby, J.—UPON the second point, we think that there is no ground of special appeal. The Moonsiff, although he did not directly raise the question of notice, heard the evidence and came to the conclusion that proper notice had not been issued. The Subordinate Judge makes some observation upon that which is highly derogatory to the Moonsiff, and which we are wholly at a loss to understand. It may be that it was not strictly a correct procedure on the part of the Moonsiff to enquire into this matter without raising a formal issue. But there is nothing that we see that can in any way suggest for a moment that in doing what he did, the Moonsiff was actuated with any unfair or improper motives. It was a mere oversight—an oversight which does not seem to have been in any way injurious to the parties, because evidence was taken upon the question. Nor was the proceeding of the Subordinate Judge in this case consistent with the view which he expressed of the Moonsiff's conduct; because if what he supposed had been the case, the consideration of this issue ought to have been entirely excluded from his judgment. Nevertheless, we find that he proceeds to determine that issue in favor of the defendant. We think we are bound to make these observations in justice to the Moonsiff. But at the same time the Subordinate Judge having expressed his opinion upon this question as a question of fact, we must accept that finding; and he entirely excludes the plaintiff from raising any further question as to the sufficiency of the notice. The Subordinate Judge does not say that that question is immaterial; on the contrary he has tried that question and decided it.

Upon the other point which has been argued, namely, whether the right procedure has been adopted in this case, and whether the Collector was not bound to proceed by way of regular suit, we reserve our opinion.

Judgment passed on the 6th March 1875.

Markby, J.—With regard to the question which we reserved in this case, namely, whether the Collector could, under Section 75 of Act IV (B.C.) of 1870, proceed for the recovery of the rent due from the defendant, as if it were an arrear of revenue, I think that he cannot.

Digitized by Google

Section 75 provides that, "farmers and others holding tenures in estates in charge of the Court direct from the Collector shall be subject to the same Rules, Regulations, and Acts as are applicable to other persons holding similar tenures and interests, under Collectors of land revenue; but when the farm is held from the manager, these Rules, Regulations, and Acts shall not apply."

It appears that the defendant in this case held a tenure under one Moulvie Abdool Rao; and that on the death of the latter, the estate descended to his minor son. The son was made a ward of Court, and the Collector took charge of his property, no manager being appointed.

Under these circumstances, I do not think the defendant "holds a tenure direct from the Collector." I think those words are meant to describe tenures which the Collector has himself created during his management, under his powers as manager: tenures so created are described as being held "under the Collector" in Regulation VI of 1822, and it is a reasonably accurate though not a technically accurate description of such tenures to say that they are held *under* or from the Collector; whereas to call the tenure of this defendant a tenure held *from* the Collector would appear to me to be altogether inaccurate.

There is no doubt that under Regulation VII of 1799 Section 25, the Collector had the same powers in respect of tenures in a ward's estate existing when he took over the management, as in respect of tenures created by himself, but the words there are different, and these powers no longer exist. The only powers which now exist in respect of tenures in a ward's estate are under Regulation VI of 1822 and Act IV of 1870 Section 75. It is only through one or other of those two provisions that Act VII of 1868 relating to summary methods of recovering arrears of revenue and other public demands can be made applicable; and both these provisions apply, in my opinion, only to persons holding under tenures created by the Collector or himself, and it is not to me any matter of surprise that the powers conferred by Regulation VII of 1799 Section 25 should have been curtailed. It is a strong proceeding to apply to the recovery of private demands the machinery which was specially intended for the recovery of public demands. But it would be scarcely reasonable to give a Collector such summary powers in respect of claims as to the justice of which he would very often be unable to form any opinion, except upon such information as he could obtain from the proprietor's own private accounts, and the servants upon the estate. It seems to me scarcely probable that in these days the Legislature intended that a private demand should be capable of being enforced under such circumstances. Where the Collector has created the tenure himself, and the whole is a matter of record in his own office, it may not be quite so unreasonable to give him these summary powers, though I confess I scarcely see how it can even then be justified, and I should certainly not be disposed to extend such a power a step beyond the express and positive words of the law.

For these reasons, I think the wrong procedure has been adopted in this case, and that the Collector had no power to take proceedings under Act VII (B.C.) of 1868, but that he was bound to recover the arrears in the usual way. The sale was, therefore, altogether illegal and must be set aside. The decree of the Moonsiff appears to be correct. The decree, therefore, of the Subordinate Judge will be reversed, and the decree of the Moonsiff restored with costs.

I have further to add that I express no opinion as to what would have been the proper procedure had Act VII of 1868 been applicable.

Mitter, J.—As regards the question reserved by us, I am of opinion that the procedure adopted by the Collector to bring the plaintiff's tenure to sale is the right procedure. I think that the tenures mentioned in Section 75 of Act IV (B.C.) of 1870 should not be limited to those only that are created during the management of the Court of Wards. It is true that the expressions used in this particular Section are not very accurate. But this inaccuracy is not cured by giving to it this limited operation. It is as incorrect to say of the tenures for the first time created by the Collector as manager of the ward's estate that they are held from the Collector, as it would be to use the same expression with reference to old tenures.

It seems to me that the construction which we ought to put upon this Section is that where the management of the ward's estate is vested in the Collector, he would be competent to proceed against the defaulting tenants of all descriptions in the ward's estate in the same manner as he could have done, if they were tenants of Government *khas mehals*.

That this was the law in 1799 is clear from Section 25 of Regulation VII of that

Digitized by Google

year. The same provision was also re-enacted in Clause 2 Section 3 of Regulation VI of 1822, and the language used in this latter Clause has been adopted with slight modifications in Section 75 of Act IV (B.C.) of 1870.

For these reasons I would confirm the judgment of the Lower Appellate Court, and dismiss the special appeal with costs.

The 13th March 1875.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Explanation of a Judge accepted.

In the matter of the Letter of Explanation by the Judge of Mymensingh in reference to the judgment in Special Appeal No. 693 *of* 1874.*

Syed Ikram Hossein, *Appellant,*

versus

Ram Lochun Dutt and others, *Respondents.*

The Court finds that the inference which it had drawn in its judgment in the Special Appeal No. 693 of 1874, to the effect that the defendant had been prevented by the District Judge from filing a copy of a certain judgment, was in fact erroneous.

Phear, J.—BEFORE we commence the business of the day, we wish to mention the matter of an explanation which has been made to us by the Judge of Mymensingh in reference to the judgment passed by him in the case of Special Appeal No. 693 of 1874.

On that special appeal being heard, this Bench remanded the case for the trial of a certain specified issue. And it then found itself obliged to make some comments upon the course which the case had apparently taken in the Judge's Court.

The letter of explanation which the Judge has sent to us represents that the view taken on that occasion by this Bench of the facts of the case and of the occurrences in his Court is in important particulars an entirely erroneous view. To quote from his letter :—"The judgment of the Hon'ble Court has "been based upon the belief that the plaintiffs had been allowed by the Court of first "instance to file a decree which they knew "had been reversed in appeal, and that "the defendant had been prevented by the "action of the Court from filing copy of the "judgment in appeal showing that such "decree had been reversed."

And this was no doubt substantially the view taken by this Bench on this point after the best consideration it could give in special appeal to the judgment of the Lower Court.

There are passages in the judgment of the Lower Court which were quoted in *ex tenso* by us such as served to lead us almost irresistibly to the inference that the judgment on appeal which the appellant desired to produce, and which he was not allowed by the Court to produce, was a judgment which had the effect of reversing the decree made in the first Court. The Judge, however, in his letter of explanation, says :—"On this point "the Hon'ble Court has been misled. No "decree was filed by the plaintiff which was "ever reversed on appeal."

And in explanation of the two passages of his judgment which have just been referred to, he says :—"As a matter of fact "they relate to entirely different decrees, "and here I must admit that the words in "the second extract according to the Hon'ble "Court's arrangements were out of place in "the judgment." So far admitting that the inference which was drawn by this Court from his words was a natural inference. And it may be added that the case was argued at length before us by learned pleaders on both sides, and that they took the view of the meaning of the Judge's language which we took, and indeed it may be said unhesitatingly that, on the face of the judgment itself, any other interpretation of its words could hardly have been suggested.

We are, however, glad to find that this view is in fact erroneous, and that the judgment, which the Lower Court in the secondly referred to passage had seemingly spoken of as a judgment by which it had been held that the subject-matter of dispute in this case was the property and in the possession of the defendant No. 1 Suddatulla, related to other property than that which was the subject of this suit.

We are, therefore, most anxious that the explanation of the Judge should have the same publicity given to it as the erroneous view of his judgment which we expressed, and which we understand has been printed in the Weekly Reporter.

We do not, however, think that anything in the Judge's letter of explanation is of such a character as to render it in any way necessary that the case should be reheard, or that any other order should be passed as between the parties than that which has been passed.

* *Ante*, p. 29.

Digitized by Google

The 13th March 1875.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Hindoo Law (Mitakshara)—Ancestral Property —A Son's Interest and Liability.

Cases Nos. 11, 32, and 49 of 1873.

Regular Appeals from a decision passed by the 1st Subordinate Judge of Bhaugulpore, dated the 27th September 1872.

Muddun Gopal Lall and others (Defendants) *Appellants,*

versus

Mussamut Gowrunbutty and others (Plaintiffs) *Respondents.*

Messrs. C. Gregory and *M. L. Sandel* and *Baboo Chunder Madhub Ghose* for Appellants.

Baboos Rash Beharee Ghose and *Mohinee Mohun Roy* for Respondents.

The interest which, under the Mitakshara law, a son acquires in the ancestral property of his father, by and in the event of being born, is of the nature of an inheritance and remains liable to the payment of the personal debts of the father, even though subsequently contracted, in the same way as the entire property would have been, had the son not been born; except only in the case in which those debts are illegal, or were contracted for an immoral purpose.

Accordingly any disposition of the property which is reasonably made by the father, for the purpose of discharging a debt of the father's, which does not fall within the exception, is one of those spoken of and authorized as "unavoidable" by the Mitakshara, ch. I, s. I, paras. 28 & 29.

Phear, J.—THE principal question which is now before us, is, whether or not the evidence taken at the original hearing, together with that taken on remand, serves to establish as against the plaintiffs the encumbrances which the appellants Girdharee Lall Sahoo, Poosun Lall Sahoo, and Lalla Muddun Gopal respectively claim to have upon the property, the subject of this partition suit.

It appears to be admitted that Shib Narain Singh, the first defendant, and his elder son, the 2nd defendant, and his younger sons, the minors, plaintiffs, together constitute a joint family living in commensality under the Mitakshara law, and in the joint enjoyment of the property which is the subject of suit.

The case in which Girdharee Lall places his claim is shortly as follows:—He says that Duryao Singh, the father of Shib Narain, and therefore the grandfather of the plaintiffs during his life, incurred great pecuniary liabilities, and that on his death the duty of discharging his debts fell upon Shib Narain. In addition to this Shib Narain himself wanted money to carry on the zemindaree and domestic business, and to perform certain marriage and obsequial ceremonies, and so from time to time borrowed money from various bankers, among others the appellant's firm; that Shib Narain and his son Amur Pershad were in possession of the disputed property in their own absolute right, and the banking transactions just referred to had been carried on with the appellant's firm continuously since the days even of Duryao, and that relying on these circumstances, the appellants, when Shib Narain and Amur Pershad were pressed by zemindaree and domestic needs, lent them money, and they secured repayment of the same by the execution of two registered bonds one after the other in favor of the appellant.

Girdharee Lall adds that having sued on these bonds, he obtained two decrees dated respectively 4th May and 14th June 1870, and when in execution of these decrees he had seized and was about to sell the property of Shib Narain and Amur Pershad, they, with the view to preserve the property from sale, executed in good faith a bond dated 9th July 1870 hypothecating 8 annas share of Mouzah Beer for the sum remaining due, namely, Rs. 6,794.

The evidence in support of this case is extremely slight. The bond itself of the 9th July 1870 is proved, though perhaps proof of it was not needed in view of the plaint. Also the decrees of 4th May and 14th June 1870 may be considered to be proved. But, although Girdharee himself and several witnesses have been examined on the remand order, they speak very imperfectly indeed to the other material facts of this story. Girdharee does, however, explain the reason why only 8 annas of the property was pledged to him by stating that the other 8 annas had in his presence been sold by Shib Narain and Amur Pershad to Sitaram, one of the defendants, in the preceding month of

Digitized by Google

May, namely, on 8th May 1870, for Rs. 86,000.

The case of Poosun Lall is precisely the same as that of Girdharee Lall, and is stated in almost exactly the same words: the only difference between the two cases is that Poosun Lall's final bond of hypothecation was for Rs. 5,874 instead of Rs. 6,794.

The evidence which has been given on behalf of this defendant even after remand, if taken alone, altogether fails to establish this case; the bond itself is not proved. It may, however, be taken (although against minors) as admitted by the plaint; and the facts established in Girdharee Lall's case can be made use of by this defendant.

Muddun Gopal reiterates the story of the other two appellants as regards the debts left by Duryao Singh and the expenditure of Shib Narain, and that Shib Narain Singh and Amur Pershad were in possession of the disputed property in their own absolute right, and then he says that confiding in these circumstances he advanced to Shib Narain and Amur Pershad the sum of Rs. 3,000 on interest by hypothecation of 8 annas share of Mouzah Beer, uslee with dakhelee under a registered bond dated the 26th Kartick 1278, F.S.

This bond is sufficiently proved as also the advance of the money thereunder, and it may also be taken as made out that the money was wanted, or at least that Muddun Gopal *bonâ fide* believed it was wanted, for the performance of a family ceremony.

With regard to *all* three appellants, it may be reckoned as certain from their written statements and from the evidence that they knew the joint family consisted of more members than Shib Narain and Amur Pershad, but they advanced money to and dealt with Shib Narain and Amur Pershad as being the only adult members of the family; and they were ultimately content to take such security for repayment of the money as Shib Narain and Amur Pershad alone could give them in the shape of a mortgage for charge upon the family property.

Consequently, the three cases may be summarized thus:—In that of Muddun Gopal the plaintiff's father and elder brother mortgaged 8 annas of the joint property to Muddun Gopal in consideration of a loan of money which was wanted for a family purpose.

In those of Girdharee Lall and Poosun Lall, putting them at their highest, the plaintiff's father and elder brother mortgaged 8 annas of the joint property in order to prevent the sale of that property at the instance of Girdharee Lall and Poosun Lall in execution of decrees which those persons had respectively obtained against the father and eldest son personally.

The plaintiffs' case then is reduced to this, namely, are the minor sons, the plaintiffs, entitled to insist on partition of the joint property and to obtain their share of the joint property free of these mortgages? In a late case reported in XX Weekly Reporter, 336, we had occasion to discuss the first part of this question at considerable length.

The result at which we arrived was that the sons could at any time during their father's life call upon him to partition the *ancestral* property. And as to the 2nd part of the question, it was also made clear in the course of the discussion that under the Mitakshara law, the occurrence of the birth of a son had the effect of limiting the father's power of disposition over ancestral property. While he could before the birth of a son deal with it as sole owner, after that event he becomes in a certain sense subject to the control of his son who by birth becomes co-owner with him,—with this further condition, however, that during the minority of his son he has an absolute discretion within certain limits.

Those limits are prescribed in paragraphs 28 and 29 of Section 1, Chapter I, Mitakshara. They are expressed no doubt in these paragraphs in somewhat general terms, and this Court is constantly called upon to decide whether a given case comes within them or not. The judgment of the Privy Council in Honooman Pershad Pandey's case (VI Moore's Indian Appeals) has been applied by analogy and considered to furnish a guiding principle upon this point. Since, however, the present appeal first came before this Court, a decision has been passed by the Privy Council, which is even more immediately relevant, namely, the decision reported in XXII Weekly Reporter, 56.

According to that decision as we understand it, the interest which under the Mitakshara law a son acquires in the ancestral property of his father, by and in the event of being born, is of the nature of an inheritance, and remains liable to the payment of the personal debts of the father even though subsequently contracted in the same way as the entire property would have been liable had the son not been born, except only

Digitized by Google

in the case where those debts are illegal or were contracted for an immoral purpose. The judgment says expressly the interest of the "sons, as well as the interest of the fathers in the property, although it is ancestral, is liable for the payment of the father's debts."

It would therefore seem to follow that any disposition of the property, which is reasonably made by the father for the purpose of discharging a debt of this kind, *i.e.*, a debt of the father's which does not fall within the exception, is one of those spoken of and authorized as "unavoidable" by paragraphs 28 and 29, Section 1, Chapter I, Mitakshara.

The debt being of such a nature that the property is ultimately liable to discharge it, the alienation of that property, whether by mortgage or sale by the father upon reasonable terms for the purpose of discharging the debt, must be substantially an unavoidable transaction.

In the present case, as the evidence stands meagre though it is, the father's debts for which this property has been hypothecated in favor of the defendants, do not appear to have been illegal or of an immoral character.

In the case of Muddun Gopal, the debt was incurred for a family purpose; and in the other two cases, they were debts, the reality of which has, so to speak, been guaranteed by a decree. It must be taken, as long as those decrees are unimpeached, that there really was a debt from the father and his eldest son to Poosun Lall and Girdharee Lall respectively. The debts then being apparently real debts, and not of an immoral character, and one of them being incurred for a family purpose, it follows that they were of such a nature that the joint property of the family was liable to meet them. And that therefore the mortgages which the father has made for the purpose of securing these debts to the defendants, appear upon the authorities which have been quoted to be good incumbrances upon the joint estate, and valid against the claims of the minors, the plaintiffs.

We thus think that while the plaintiffs are no doubt entitled to have a partition of the property, the partition must be subject to the mortgages of the three appellants to the extent of 8 annas of the entire property.

The appellants are entitled to their costs; but as we cannot give a decree making the minors pay the costs, these costs will be declared a charge upon the property.

The 13th March 1875.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Presumption of Regularity—Irregularities.

Cases Nos. 12 and 13 of 1874.

*Applications for Review of Judgment passed by the Hon'ble Justices J. B. Phear and G. G. Morris on the 14th September 1874, in Miscellaneous Appeals, Nos. 136 and 137 of 1874.**

Chowdhry Mahomed Zuhoorul Huq, Decree-holder (Respondent) *Petitioner,*

versus

Mahomed Yakoob and others, Judgment-debtors (Appellants) *Opposite Party.*

Mr. J. T. Woodroffe and *Moonshee Mahomed Yusoof* for Petitioner.

Mr. C. Gregory for Opposite Party.

The maxim *omnia presumuntur rite esse acta* cannot apply where it is plain that the greatest possible irregularities have occurred.

Phear, J.—We see no reason to alter our judgment in the case of Yakoob Ali. It seems certain that Yakoob Ali became a major, and that the plaintiff knew this fact soon after the original decree was passed. And we are not satisfied that he was made a party either to the proceedings in review which terminated in the decree of December 1862, or to the proceedings for the assessment of wasilat. We are not, we think, justified in assuming on the maxim *omnia presumuntur rite esse acta* that he was duly made a party to these proceedings, because it is plain that the greatest possible irregularities have occurred in this suit. And there may have been good reason why the judgment-creditor should not care at the time of these proceedings to carry them on against Yakoob Ali. The probability is, as seems to have been the case from the record, that he was altogether neglected after the passing of the original decree, until the application of August 1873.

* 22 W. R., 533.

Digitized by Google

As regards Mullick Enayet Ali, it seems that when our decision was given, we were under some misapprehension as to the amount of money which had been paid in satisfaction of the decree. And we think, therefore, that execution must issue in the terms which have already been ordered by this Court on the 2nd May 1873. We refer to the final order passed by Mr. Justice Kemp's Bench.

We think there should be no costs.

The 15th March 1875.

Present :

The Hon'ble A. G. Macpherson, *Officiating Chief Justice*, and the Hon'ble E. G. Birch, *Judge*.

Bhaolee Rents—Waiver.

Case No. 2648 of 1873.

Special Appeal from a decision passed by the Judge of Sarun, dated the 9th August 1873, *reversing a decision of the Moonsiff of Chaprah, dated the 15th January* 1873.

Mohunt Narain Geer (Defendant) *Appellant*,

versus

Gour Surun Doss and another (Plaintiffs) *Respondents.*

Baboo Mohesh Chunder Chowdhry for Appellant.

Moulvie Abdool Baree for Respondents.

A landlord who refuses to accept rent in kind when it is offered to him, on the ground that he is suing for a money rent, cannot, on the dismissal of his suit, come into Court again and sue his tenant for the value of what he refused when it was proffered.

Macpherson, C.J.—We think that the decree of the Judge in so far as it relates to the year 1278 must be set aside.

The suit is for a sum of money in lieu of a certain portion of the produce, being the defendant's bhaolee rent for the year 1278.

It appears from the judgment of the Judge that in 1278, when the rent became due, the present plaintiff was prosecuting a suit against the defendant, the object of which was to recover a *money* rent for this very land at an enhanced rate. When the crop was actually on the ground, the defendant applied to the Fouzdaree Court by petition, praying that the plaintiff might be ordered to take his hakimee rent. Thereupon, the plaintiff appeared and explained to the Court that as he was suing for a *money* rent, he did not wish to take and would not take the bhaolee rent, and therefore that the defendant might take his crops where he pleased. Subsequently the suit for the *money* rent was dismissed; and the plaintiff now turns round upon the defendant and brings the present suit against him to recover the money value of the bhaolee rent which he declined to receive.

It seems to us that the plaintiff has put himself out of Court as regards the rent of 1278 by not taking it when it was offered to him. Having once positively refused to accept it, and told the defendant to to take it where he liked, it is contrary to all principle that he should be allowed to come into Court now and sue the defendant for its value. He cannot sue for the money value, simply because it did not suit his convenience to accept the rent in kind when offered to him. So far as regards the year 1278, the judgment of the Lower Appellate Court will be reversed with costs in both Courts in proportion.

The 15th March 1875.

Present :

The Hon'ble A. G. Macpherson, *Officiating Chief Justice*, and the Hon'ble E. G. Birch, *Judge*.

Uncultivated Land—Limitation—Possession.

Case No. 2647 of 1873.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 17th August 1873, *affirming a decision of the Subordinate Judge of that district, dated the 14th June* 1873.

Mitterjeet Singh (Defendant) *Appellant*,

versus

Radha Pershad Singh (Plaintiff) *Respondent.*

Mr. C. Gregory for Appellant.

Baboo Mohesh Chunder Chowdhry for Respondent.

If adverse possession for a sufficiently long time is proved, the title of a person to uncultivated or jungle

Digitized by Google

land may be barred by limitation in the same manner and to the same extent as in the case of cultivated land; the evidence of possession being the exercise of such acts of ownership as would ordinarily be exercised over property of that nature.

Macpherson, C.J.—We think that the decree of the Judge must be set aside, and the case remanded to him for re-trial. The principal issue in both the Lower Courts was whether the plaintiff had been in possession within twelve years prior to suit. The Judge has not come to any distinct finding upon that point. It seems to us essential that he should decide it, and it is impossible to deal with the case properly without deciding it.

The lands in dispute being or having been jungle lands, it will probably not be necessary for the plaintiff to prove such acts of ownership as would be required in the case of cultivated land. As stated by Sir Barnes Peacock in the case of R. Watson & Co. *v.* The Government in III Weekly Reporter, page 78, "there may be great "difficulty in proving the possession of "uncultivated lands; and if there is any "doubt as to who is in possession, the "case would probably be determined in "favor of the party who proves title. "But if one party can prove that he has "been in adverse possession of uncultivated "lands for a sufficiently long time to bar the "remedy of the person who has title, the "case of the latter may be barred by limita-"tion, as to uncultivated land or jungle, "in the same manner and to the same extent "as regards cultivated land." And again, in page 80, he says :—"The exercise of such "acts of ownership over jungle lands as "would ordinarily be exercised over property "of that nature would be evidence of posses-"sion." In short, the Court must look at all the circumstances of the case, the nature of the land, and the manner in which it might be reasonably expected to be held and enjoyed by the proprietor, and then find whether the plaintiff ever had possession within twelve years. If he had not, it seems to us that his suit is barred.

As the case cannot go back to the individual Judge who tried the case (he having left the district, if not the country), the Court below must reconsider the case upon all the issues, and especially consider the evidence as to the disputed land falling within the plaintiff's boundaries according to the survey map.

The costs of the remand will abide the result.

[Privy Council Judgment].

The 26th February 1875.

Present:

Sir James W. Colvile, Sir Montague E. Smith, and Sir Robert P. Collier.

Claim to Debuttur Land—Form of Plaint—Agreement—Presumption of Fraud.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Radha Mohun Mundul and others

versus

Jadoomonee Dossee.

A suit was brought by a Hindoo widow to recover her share, as heiress to her husband, in certain family property of which she claimed a portion in her absolute right, and a portion as one of the joint shebaits of certain idols. Among other properties plaintiff claimed one-fifth share in a talook, not as a debuttur property, but, in right of her husband, as her absolute property. The first Court found that this share was the property of a certain idol, and held that she had not maintained the allegation in her plaint, and even, if entitled to it in her right of joint shebait, she could not recover in that capacity, as she had not framed her plaint in that way and had not sued as shebait. The Privy Council held the High Court to be right in treating this objection as one rather of form than of substance and in giving the relief prayed for.

The defendants having pleaded that certain Government paper in which plaintiff claimed a share, had been appropriated by a memorandum of agreement, to the service of an idol, and the agreement was substantiated by very strong evidence and shown to have been acted upon, by all the parties for years, the Privy Council held that it could not be set aside, as a colorable transaction having no validity, merely upon the suggestion that the amount set aside was exorbitant, and that there might possibly have been an intention to defraud widows and others.

This was a suit brought by the widow of one of six sons of one Nurronarain, to

* From the judgment of Couch, C.J., and L. S Jackson and F. A. Glover, JJ., dated 15th November 1870.

Digitized by Google

recover the share which she was entitled to as heiress of her husband in certain family property, and she claimed a portion of that property in her absolute right, and a portion as one of the joint shebaits of certain idols, that latter property being debuttur property. Her share became a fifth instead of a sixth by a family arrangement, whereby the share of one of the brothers had been extinguished. Her case came in the first instance before the Judge of the Twenty-four Pergunnahs; that judgment, together with the judgment of the High Court, and the course which the case has taken, make it unnecessary to refer to a great number of issues and of statements and a great deal of evidence in the case. That Judge decided in her favor with respect to a certain portion of the real property and a certain portion of the personal property, and so far there is no question with respect to his decision. With respect to her claim to the debuttur property, he decided in her favor as to a portion of it, namely, a fifth share of Government papers for the sum of Rs. 14,000. He decided that she was entitled to a fifth share of those securities, and to retain them in her hands; but that inasmuch as they were debuttur property, she was not competent to waste the same either by gift, sale, or in any other way. Upon the question — which was one of the main questions in the cause, raised between the parties—whether she had any right or title at all to property which was debuttur, he observed :—"It is admitted "by both the parties that there exist orna- "ments, plates, and furniture as well as "debuttur lands and rents for the use" of certain idols. The "question which then "presents itself for my consideration is, whe- "ther the plaintiff can have possession of "the said properties. The defendants do "not allege that the widows of the family "shall not be competent to hold possession "of the said endowed properties; in other "words, that they have not the power of "exercising that control over the same "which the male members of the family "can exercise. They merely say that as "the said properties are of a debuttur "character, they are not susceptible of "division among the shareholders; and that "since the plaintiff is a childless widow, she "is not competent to carry on the service of "the gods. That the properties in question "do not admit of any partition among the "co-sharers is a fact which must be admitted "by me; but I do not see any reason why "a widow of the family should be incapa- "citated from superintending the service of "the gods. It is not urged by the defend- "ants that any such rule has been laid "down in the family, and that under it the "widows have been excluded from the above "superintendence. On the other hand, "among the Hindoos, persons belonging to "no other caste except that of Brahmins "can perform the service of a god with his "own hands, that is, worship the idol by "touching its person. Men of other castes "simply superintend the service of the "gods and goddesses established by them- "selves, while they cause their actual "worship to be performed by Brahmins. "Thus, when persons of the above descrip- "tion can conduct the service of idols in the "above-mentioned manner, why should not "the widows of their family be able to carry "on worship in a similar way?" And after citing a decision of the High Court, he came to the following conclusion :—"Conse- "quently, there is nothing to prevent the "Court from finding that the plaintiff has a "right to hold possession of the debuttur "properties enumerated by the defendants "in the 12th paragraph of their written "statement, and to superintend the service "of the gods conjointly with the other "co-sharers."

Two other questions arose which it is necessary to notice, and two only. The plaintiff claimed, among other properties, a right to a one-fifth share in a talook called Talook Chunder Hatt, which is No. 86 in the particulars of her plaint; and she claimed that, not as debuttur property, but in right of her husband, as her absolute property. The Subordinate Judge found that this property was in fact the property of a certain idol which may be called Sreedhur; and, therefore, he held that she had not maintained the allegation in her plaint. It was, indeed, suggested by her advocate before him that, although she had failed to prove an absolute right in the property, still she was entitled in her right of joint shebait to a share of the property of the idol; but the Subordinate Judge held that as she had not framed her plaint in that way, and had not sued as shebait, she could not recover in that capacity, and, therefore, he decided against her upon that point.

The other question, which is the most important question in the cause, was this :—The defendants contended that other Government papers for a sum of two lakhs and Rs. 15,000, which with the accumulations of

Digitized by Google

interest had become a sum of two lakhs and Rs. 57,000, had been, by an agreement of the whole family then in existence in 1859, devoted to the service of this idol Sreedhur, and, therefore, that the plaintiff could not recover a share of that property, which she sued for, not in her capacity of shebait, but as part of her husband's estate. It was contended on the part of her advocate that the supposed agreement of dedication, even if actually executed, was colorable and collusive, that it was not intended to have effect, and was merely entered into for the purpose of defeating the possible rights of the widows, and keeping the property in the hands of the male members of the family. The Subordinate Judge found in favor of the defendants upon this contention: that the agreement was executed, and was a *bonâ fide* agreement; and upon the same argument being used which had been used before with respect to the talook, namely, that if the plaintiff was not entitled to any share of this as heiress of her husband, still she was entitled to some share of it as shebait, he made the same reply that she had not sued as shebait, and therefore dismissed her claim to it.

The decree is in these terms:—After giving her certain relief, it says "that she be "further competent, by furnishing security "against waste, to keep in her own possession a fifth share of the Company's papers "for Rs. 14,000, belonging to the estate "of Manick Chunder Mundul, and owned "by the idol Gopeenath Thakoor, which "are now in the hands of the principal "defendants: that with the exception "of the idol Sreedhur Thakoor, in "regard to whose shebaitship the competency "or otherwise of the plaintiff has not been "determined in this suit, she shall have the "power of holding joint possession with the "principal defendants of the realties and "personalties belonging to the other joint "gods of the litigant parties."

Upon this, both parties appealed to the High Court. It is not necessary to notice the appeal of the defendants. That was dismissed with cost, and no question is now raised about it; but it is necessary to notice the main points which were raised by the appeal of the plaintiff. She contended that, in addition to the relief which she had obtained in the Court below, she was entitled to a share of this talook which had been mentioned, and also to a share of the Government papers for two lakhs and Rs. 57,000, either beneficially or as shebait. The High Court upon the first issue, namely, as to her share of the talook, decided in her favor that she was entitled to claim one-fifth as shebait, and they observed that, although perhaps by a strict construction of the declaration, she might be held not to have expressed her claim to it properly, nevertheless, this was an objection rather of form than of substance, and that looking to the whole case, and considering that the evidence of both parties was gone into, they thought the justice of the case required that they should give her this relief.

Their Lordships are of opinion that the High Court was right in treating the objection which had been made to the reception of this claim by the Subordinate Judge as an objection rather of form than of substance, and in giving her the relief which she prayed for.

Then comes the question, and the more important question, as to her right to a share of the large sum of rupees, being Government paper, which the defendants allege had been appropriated irrevocably by the family to the service of the idol Sreedhur by a memorandum of agreement of the 9th of February 1859. Upon that question the High Court, after intimating that there was no estoppel on the part of the plaintiff, as there would have been none on the part of her husband from setting up that the agreement of appropriation on the part of the family was fraudulent and collusive, a point on which it is not necessary now to enter, came to the conclusion that the agreement was collusive. They do not appear to have doubted that such an agreement was executed upon the day it bears date, but they treat it as invalid, and their reasons are to this effect:—They observe that in the memorandum of agreement, "no "person is named whose duty it would be to "see that the income from the notes was "applied for the purposes mentioned, nor any "provision for its being applied, and further, "that upon the defendants' own showing it "was not applied, but was allowed to accumulate, and was invested in the purchase "of other notes." Then "that the notes "have not been produced." Then that Hurry Mohun, the late husband of the plaintiff, had pledged some of these notes at the Bank of Bengal; then, further, that there were no attesting witnesses to the memorandum, although they do not lay much stress upon that; and then they proceed to observe:—"The real aspect of the transac"tion appears to us to be that the parties,

Digitized by Google

"not wishing at that time to divide the whole "of the Government notes amongst them, or, "possibly, in order to prevent a widow from "taking any part of it, and to preserve it "for the male members of the family, "resorted to this contrivance to keep a por- "tion as a joint fund to accumulate, and "be afterwards used or divided as they "might have occasion."

Their Lordships are unable to concur in this finding of the High Court. The document is conclusively established, at all events, as far as its execution is concerned, about which there never appears to have been any serious dispute. Two of the defendants, Radha Mohun Mundul and Issur Chunder Mundul, give evidence, and very distinct evidence, upon this point, and that evidence is confirmed by other witnesses. The occasion which is said to have given rise to it appears a legitimate one, and one not unlikely to suggest the execution of such a document. It is said that one of the brothers, Chundernarain being in an ailing condition, and probably not expecting to live long, desired that a division should be made of the family property, as far as it consisted of Company's paper, and was divisible; whereupon a memorandum of agreement was entered into, which is to this effect:—That the heads of the family then existing, being the five brothers, and Bhuggobutty Dossee, the widow of Uddoito, a deceased brother, agree to set apart certain promissory notes of the value of two lakhs and Rs. 15 000 for the daily service of a certain idol called Sreedhur, and other religious objects connected with such service, and to divide the residue among them, in shares amounting to Rs. 45,000 for each. They take each the share of Rs. 45,000, and they all sign the agreement. There is abundant evidence of this document being subsequently acted upon. It appears that about three years after the document was executed, Nistareenee Dossee, the widow of Romanath, the son of Uddoito, one of the brothers, brought an action against the brothers who were then alive to recover her share as a widow, whereupon the defendants, including Hurry Mohun himself, the husband of the present plaintiff, set up this agreement. It does not appear that the plaintiff in that suit disputed it; and finally she accepted a compromise upon the terms of that agreement, she retaining what she would be entitled to receive on the supposition that it was valid, namely, altogether Rs. 45,000 of which 20,000 had been previously paid to her mother-in-law Bhuggobutty Dossee, who, as has been observed, was a party to the agreement. But, further, in addition to the evidence of the defendants themselves, there is that of gomastahs and others that this agreement was acted upon, that a temple was erected to the idol at a considerable cost, though the precise cost can scarcely be determined without going through a number of accounts, and that that temple took several years in erection. A number of accounts are put in, which, no doubt, may be open to an observation made by the High Court that specific entries in them were not sufficiently called attention to in the Court below, but which nevertheless, cannot be disregarded; and unless these accounts are wholly fabricated, which their Lordships see no reason whatever to suppose, they do show beyond all doubt that the agreement was acted upon to a great extent for many years, and that a great deal of money was spent upon the purposes contemplated by it. With regard to the observation of the High Court that the interest was not applied to the purposes indicated by the agreement, but was allowed to accumulate, and was invested in the purchase of other notes, it must be borne in mind that the amount accumulated, some Rs. 42,000, would by no means be the whole interest of those notes, and that such an accumulation would not be at all inconsistent with the agreement having been acted upon, and a considerable portion of the income having been applied to the purposes stated in it.

On the whole, it appears to their Lordships that this agreement is substantiated by very strong evidence. It is shown to have been acted upon by all the parties; and their Lordships do not think themselves justified in putting it aside and declaring it to be a colorable transaction having no validity, merely upon the suggestion—for it amounts to no more—that the amount set aside was an exorbitant amount, and that there might possibly have been some intention to defraud widows or some other persons. It is not upon mere speculations of this sort that an agreement proved by evidence so strong to have been not merely executed, but acted upon for a number of years, can in their Lordships' judgment be properly set aside.

This agreement being, in their Lordships' opinion, established, the question still remains whether the plaintiff is not entitled to her share of this property as joint shebait of debuttur property appropriated to the service of this idol; and this question appears to their Lordships to depend very much on the

Digitized by Google

same considerations as those which have induced them to uphold the judgment of the High Court with respect to her share of a talook which was purchased for the same idol, and, as far as it appears, by the same fund. It may be here observed that, although there is evidence of some parol agreement (one of the witnesses putting it as an agreement before the execution of this memorandum of February 1859) that the head of the family, the eldest brother, should be the sole shebait, nevertheless that evidence appears to their Lordships to be inconsistent with the documents. The document itself, of February 1859, contains no mention or suggestion of there being any one shebait to the exclusion of the rest. On the contrary, it would appear from it that all parties were equally entitled to be shebaits of the idol. But, further, the accounts which have been put in by the defendants show by their heading that such was the intention; for, so far from stating that any one member of the family is entitled to retain all the property and to see to its application himself, the heading of the accounts treats all the members of the family, including widows of deceased brothers, as joint shebaits.

Under these circumstances, it appears to their Lordships that the plaintiff, although she has failed to establish the title which she relied upon to the two lakhs and Rs. 57,000, is nevertheless entitled to a share of it as joint shebait; and therefore, their Lordships will humbly recommend Her Majesty to reverse so much of the decree of the High Court as declares the plaintiff's right to a fifth share of the two lakhs and Rs. 57,000, and the interest thereon, and as directs that one-fifth share and interest be delivered over and paid to her, and as condemns the defendants in the payment of the costs of that appeal; and, in lieu thereof, to declare that the plaintiff is entitled as joint shebait to a fifth share of the Government notes for two lakhs and Rs. 57,000 and is competent by furnishing security against waste to keep in her own possession the said fifth share and to hold the same, subject to the trusts for the worship of the idol Sreedhur, and by ordering that each party should bear his own costs of that appeal, that is, the appeal to the High Court; and their Lordships think that there should be no costs of this appeal.

The 15th March 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Rival Decrees—Priority of Attachment—Mortgage Liens—Execution Sales.

Case No. 481 of 1874.

Special Appeal from a decision passed by the 2nd Subordinate Judge of Bhaugulpore, dated the 18th December 1873, reversing a decision of the Additional Moonsiff of that district, dated the 30th April 1873.

Modhoo Soodun Singh (Defendant) *Appellant,*

versus

Mokundee Lall Sahoo (Plaintiff) *Respondent.*

Baboos Rash Beharee Ghose and *Mohinee Mohun Roy* for Appellant.

Baboo Huree Hur Nath for Respondent.

M L sued P to recover certain secured and unsecured debts, and obtained a decree declaring his lien over the hypothecated properties to the extent of the claim secured by simple mortgage. M S also, to whom the properties had been pledged as collateral security, obtained a decree against P. Both decree-holders took out execution, and the properties were attached. In execution of M L's decree, one of the properties was sold and purchased by himself, and the other was sold and purchased by M S. The Court executing the decrees, from the sale proceeds, satisfied M L's secured debt and the money due to M S under his decree, applying the balance to the satisfaction of the unsecured portion of M L's decree. The result was that M L's money decree remained unsatisfied, and he now sues M S to recover the balance due contending that the sale proceeds were wrongly paid over to the defendant:

HELD that as these decrees were being executed in the same Court, and the properties mortgaged were attached by all the mortgagees and advertised to be sold (especially as no notice of subsequent encumbrancer's lien was given), the mouzahs were sold unencumbered, with the respective liens of the mortgagees. Accordingly, defendant paid full value for his purchase, and the lien which he had over the property was transferred to the sale proceeds.

Consequently the respective rights of the parties stood thus:—Plaintiff was the first attaching creditor; but the defendant, as the holder of a lien, created some time before the plaintiff's attachment, was entitled to priority. Plaintiff's suit therefore fails.

Mitter, J.—THIS suit was brought by the plaintiff to recover Rs. 507-10 from the defendant on the ground that a certain sum of money representing the sale proceeds of properties sold in execution of a decree has been wrongly paid over to the defendant, a rival decree-holder. The defendant contends

Digitized by Google

that he was justly entitled to that money, and the plaintiff's claim, therefore, should be dismissed. The suit was dismissed by the Moonsiff, but on appeal the Subordinate Judge has reversed the judgment of the first Court and has decreed the plaintiff's claim. The only question we have to decide in special appeal is whether or not the order of the Court apportioning the sale proceeds between these two decree-holders is equitable and just.

The facts found by the Lower Courts are these:—One Pearee Lall borrowed money from a person of the name of Gunesh Singh hypothecating four mouzahs, *viz.*, (1) Chulna, (2) Mendia, (3) Boozurg Ramjumma, and (4) Kalla Koosum. The same properties were also given in collateral security for the second and third times in bonds executed respectively in favor of the plaintiff Mokundee Lall and the defendant Modhoo Soodun. There were also unsecured money debts due from Pearee Lall to the plaintiff. Gunesh Singh and the defendant obtained decrees upon their respective securities.

The plaintiff brought one suit against Pearee Lall for the recovery of both the secured as well as unsecured debts. The decree that was passed in his favor, declared his lien over the hypothecated properties to the extent of the claim secured by simple mortgage. All these decree-holders took out execution, and the four mouzahs were attached in all of them. The pleader for the respondent before us contested this matter, alleging that the record does not show any process of attachment taken out by the defendant. But we have not the execution records before us. The Moonsiff distinctly finds that there was such attachment, and this fact does not seem to have been disputed in the Lower Appellate Court. Therefore, we must adopt the finding of the Moonsiff, and hold that the defendant had attached all the four mouzahs. Then it appears that in execution of Gunesh Singh's decree, the properties Nos. 1 and 2 were sold for Rs. 17,300, and after satisfying the whole amount due, there remained a surplus of Rs. 546-15-6. Then followed the sale in execution of the plaintiff's decree, and Boozurg Ramjumma was first put up in auction and purchased by the plaintiff himself for Rs. 8,800, and after it the last property, *viz.* Kalla Koosum being sold in execution of the same decree was purchased by the defendant for Rs. 9,700. The plaintiff's decree was for Rs. 12,408, of which on the day of the distribution of sale proceeds Rs. 7,804-12 represented the debt secured upon these properties, and the balance Rs. 4,603-8 was due on account of simple bonds. The defendant's decree amounted to Rs. 7,141-5.

The Court executing these decrees distributed the sale proceeds in the following manner:—From the sale proceeds of the Chulna and Mendia, Gunesh Singh was paid the whole amount of his decree, and then out of the surplus sale proceeds of these two mouzahs and the full sale proceeds of the remaining two properties, the plaintiffs secured debt, and the money due to the defendant under his decree were satisfied, and the balance applied for the satisfaction of the plaintiff's unsecured portion of the decree. The result was that the plaintiff's money decree to the extent of Rs. 502-9-6 remained unsatisfied. The plaintiff contends that this was an erroneous mode of distribution, because under Section 270 of Act VIII of 1859, the properties Nos. 3 and 4 having been sold in execution of his decree, and his attachment being of prior date, he was entitled to have the whole of his decree satisfied first. If the correct mode of distribution had been adopted, the result would have been that instead of his decree to the extent of Rs. 502-9-6 remaining unsatisfied, the defendant's decree to that extent would have been left unpaid. Consequently, this amount of money which he should have received has been wrongly paid over to the defendant. It has been urged on the other hand that the plaintiff so far as the unsecured portion of his debt is concerned should rank next to him, and therefore the mode adopted in the distribution of these sale proceeds is the most equitable and just.

Before deciding which of these contentions is correct, I may observe here that the Subordinate Judge is wrong in holding that he was bound by the provisions of Section 270 of Act VIII of 1859 to decree the plaintiff's claim even if he were satisfied that the principle of apportionment adopted was the most equitable. In a civil suit of this nature, a Court of justice would not be bound to decree the plaintiff's claim in all cases wherever it would be found that the order complained of was contrary to the provisions of the Civil Procedure Code. In the case reported in the 9th Weekly Reporter, page 514 (which is the leading case on the subject), the Chief Justice Sir Barnes Peacock, after expressing his opinion that "an action "will lie in the Civil Courts on behalf of "one decree-holder against the holder of

Digitized by Google

"another decree for obtaining a refund of "money which has been paid to the latter "under an order passed in the execution "department contrary to the provisions of "Section 270 of the Procedure Code," makes the following observation :—"We must "guard ourselves from being understood to "determine that the plaintiff in such a suit "would under all circumstances be entitled to "recover. There may be circumstances by "which he may be equitably precluded from "recovering ; and it will be for the Court "which decides the suit to determine "whether having regard to all the equities "between the parties, the plaintiff is entitled "to recover or not." These observations clearly show that the question which we have to determine is not such a narrow one as supposed by the Subordinate Judge. We have to determine in the language of the decision above quoted, "whether having "regard to all the equities between the "parties, the plaintiff is entitled to recover "or not."

It is admitted on all hands that Gunesh Singh was entitled to be first paid, therefore in deciding this case we may leave his decree out of consideration. It is not also disputed that so far as the plaintiff's secured portion of the decree was concerned, he was also entitled to have priority over the defendant. Therefore the only question which we have to decide is whether the balance of the sale proceeds after satisfying the decree of Gunesh Singh and the secured portion of the plaintiff's decree should have been first applied to the unsecured portion of the plaintiff's decree, and not to that of the defendant.

The properties having been first attached by the plaintiff, his prior right would be undoubted, unless it were shown upon some equitable ground that this right should not be given effect to. It is on the other hand equally clear that if the sale proceeds represent the full value of the properties sold unencumbered with any lien, the plaintiff notwithstanding his prior attachment would be postponed to the defendant, whose lien was created long before the date of the attachment. Therefore the question before us reduces itself to this, *viz.*, whether the sale proceeds of the properties sold represent the full market value in their unencumbered state. It is not disputed before us that the price paid for one of them, *viz.*, Boozurg Ramjumma purchased by the plaintiff is its full value. Therefore the question is reduced to a further more narrow compass, that is, Does Rs. 9,700 paid by the defendant for the last of these properties, Koosum Kalla, represent its full value, or that of the debtor's equity of redemption in respect of the defendant's mortgage rights ?

Having regard to all the circumstances of this case, I am of opinion that this question ought to be answered in favor of the defendant. All these decrees were being executed in one and the same Court, and the properties mortgaged were attached by all the mortgagees and advertised to be sold for the satisfaction of their mortgage debts. Under these circumstances (and especially when we find that no notice of subsequent encumbrancer's lien was given at the time of each sale), it is only reasonable to hold that these mouzahs were put up to sale quite unencumbered with the respective liens of the three mortgagees. In a case quoted before us from the 19th Weekly Reporter, page 255, it has been broadly laid down that where a decree-holder, who holds a mortgage security similar to that of the defendant in the present case, attaches the property hypothecated, he becomes entitled to transfer his lien from the property to its sale proceeds, even if it be sold in the execution of a decree of a rival decree-holder. In other words, the rule of law laid down is this, that wherever a decree-holder holding a simple mortgage attaches the property hypothecated, the sale which follows whether in the execution of his decree or that of any other person has the effect of transferring the property hypothecated to the purchaser freed from the mortgage liability. It is not necessary for us in this case to go to that length. I am of opinion that under all the circumstances adverted to above, we must hold that the properties were put up to sale freed from all the mortgage liabilities.

This being so, the defendant in this case must be held to have paid full value of Mouzah Koosum Kalla, and the lien which he had over this property was therefore transferred to its sale proceeds. Consequently, the respective rights of the parties stand thus :—Plaintiff was the first attaching creditor, and the defendant was the holder of a lien created some time before the plaintiff's attachment. Between these two, the holder of a prior lien is clearly entitled to priority.

The result, therefore, is that the plaintiff's suit fails, and we accordingly reverse the decree of the Lower Appellate Court made in his favor, and dismiss the suit with costs in all the Courts.

Glover, J.—I concur.

Digitized by Google

The 15th March 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Ghatwalee Lands taken for Railway Purposes—Compensation—Rights of Zemindar (Reg. XXIX of 1814 s. 4) of Ghatwalee and of Under-Tenants.

Case No. 22 of 1874.

Regular Appeal from a decision passed by the Officiating Subordinate Judge of Beerbhoom, dated the 29th October 1873.

Ram Chunder Singh Ghatwal (Plaintiff) *Appellant,*

versus

Rajah Mahomed Jowhurzuma Khan and others (Defendants) *Respondents.*

Baboos Mohinee Mohun Roy, Sreenath Dass, and *Lukhee Churn Bose* for Appellant.

Baboos Bama Churn Banerjee and *Gopee Nath Mookerjee* for Respondents.

In a suit by a ghatwal to recover compensation-money, deposited in the Government treasury, for land appertaining to a ghatwalee talook which had been taken for railway purposes, the defendants who claimed to participate in the compensation were the zemindars of whose zemindaree the ghatwalee talook was a component part, and the representatives of one B, who had held a sub-tenure in the ghatwalee mehal:

HELD that, as the zemindars had sustained no loss, but would continue to receive from Government, under Regulation XXIX of 1814 s. 4, the same profits as they had been hitherto enjoying: they were not entitled to any compensation.

HELD that as B had not during his lifetime any valid title to any portion of the lands taken; but was allowed to remain in possession by the mere sufferance of the ghatwal, his representatives were not entitled to a share in the compensation.

HELD that plaintiff being a ghatwal, and not absolute owner, was entitled only to the interest of the compensation-money which he was bound to keep intact as a part of the ghatwalee property.

Mitter, J.—THIS suit was instituted on behalf of Ram Chunder Singh, minor, who has now attained his majority, for obtaining Rs. 15,125-11-6 deposited in the Government treasury of Deoghur, being the compensation-money for 1,765 beegahs 9 cottahs 14 chittacks of land appertaining to the ghatwalee talook Pathrole taken for the construction of a railway.

The allegation of the plaintiff is that he is entitled to the whole of this compensation-money, and the defendants having unjustly claimed the same, it has been detained in the treasury, leaving the contending parties to have their respective rights settled by a competent Civil Court.

For the purposes of this appeal it is sufficient to notice only the objections of two sets of defendants, *viz.*, the zemindars within whose zemindaree this ghatwalee estate is situated, and the representatives of the defendant No. 29, Bunwaree Lall, who has died since the institution of the present suit.

The zemindars claim a share in the compensation-money upon the ground that the land taken, though appertaining to the ghatwalee mehal of Pathrole, yet is a component part of their zemindaree; that the ghatwals hold their tenures on the condition of performing certain services, and if they should cease to perform those services, or the services become wholly unnecessary, the lands of the tenures would revert to them; and that under the provisions of Regulation XXIX of 1814, should any increase happen to be made in the ghatwalee revenue, the increase shall belong to them. Therefore they contend that their interests in the lands taken are of such a nature as to entitle them to claim a participation in the compensation-money.

The defendant Bunwaree Lall alleged in his written statement that he holds a sub-tenure in the plaintiff's ghatwalee mehal, charged with a fixed annual rent of Rs. 104; that a portion of the lands taken falls within his sub-tenure, the compensation-money in respect of which was therefore due exclusively to him. He further stated that out of the compensation-money which thus falls to his share, he had transferred his rights in respect of Rs. 4,987-7-6 to one Thacoor Ram Saha of Pathrole, and that he was entitled to receive the balance, *viz.*, Rs. 713-9-9.

The Lower Court has apportioned the whole amount of the compensation-money in deposit in the Deoghur treasury thus:—Rs. 4,929-3-10 to the plaintiff, Rs. 3,167-4 to the zemindars, and Rs. 6,291-2-3 to the widows of, and the purchaser from, the late Bunwaree Lall Singh.

The plaintiff has preferred this appeal on the ground that he is entitled to the whole amount, and the Lower Court is

Digitized by Google

wrong in allowing any share to the defendants. As the objections upon which these two sets of defendants rest their claims, are quite distinct, we must deal with them separately.

As regards the zemindar's claim, it is clear to me that he is not entitled to any share. This is one of those ghatwalee estates which are situated in the district of Beerbhoom, and which have become a subject of special legislation. Regulation XXIX of 1814 was passed to define and to determine the rights between the ghatwals, the zemindars, and the Government. The effect of this legislation was to declare that these ghatwalee lands should continue to be considered as a part of the zemindaree of Beerbhoom; that the ghatwals should pay the revenue assessed upon them direct to the Government treasury; that the difference between the amount assessed on the ghatwals, and the fixed assessment of revenue payable to Government by the zemindars on account of the ghatwalee lands, should be paid to the latter and their heirs and successors in perpetuity; that so long as the ghatwals should pay the amount assessed upon them punctually, and perform the services imposed upon them, they and their descendants in perpetuity should be maintained in possession of the ghatwalee lands; and that lastly, in case of any default in the punctual discharge of the revenue assessed by any of the ghatwals, the Governor-General in Council would be competent to cause the defaulting tenure to be sold, or to make it over to a fresh grantee upon the same revenue, or upon an increased or reduced assessment, as to the Government might appear meet and proper. There was a further provision made, which was entirely in favor of the zemindar, *viz.*, should any increase of revenue be obtained on account of any arrangement last adverted to, the said increase should be paid to the zemindars, their heirs, and successors.

From these provisions it is clear that the profits of the zemindars out of these ghatwalee lands have been so far fixed that they would not, under any contingency, fall below the amount mentioned in Section 4 of the Regulation above quoted, *viz.*, the difference between the revenue assessed on the ghatwals and the fixed assessment of revenue payable by the zemindars on account of these ghatwalee lands. It is true that under the last provision referred to above (Section 5 of the Regulation), there is a chance of their profits increasing, but under no circumstances are they liable to diminution.

Now, in this case, unless it is shown that the zemindars have suffered any loss, they are not entitled to any compensation. It is clear that they have sustained no loss at present, because notwithstanding the lands taken out of their zemindaree, they will continue to receive the same profits, which they have been hitherto enjoying. Under Section 4 of the Regulation in question, they are entitled to receive from Government a fixed amount quite irrespective of the quantity of land held by the ghatwals. All that they can say is that the lands being severed from their zemindaree, their chance of prospective gain under Section 5 of the Regulation is to a slight extent diminished. But this is such a remote chance that no appreciable value can be assigned to it. For these reasons I think the zemindars are not entitled to participate in the compensation-money in deposit.

Then we come to the claim put forward by Bunwaree Lall. It is evident that he held a subordinate tenure within the plaintiff's ghatwalee mehal, and the said tenure is still in the possession of his widows. It has also been established upon the evidence that this tenure was created by an ancestor of the plaintiff to provide for the maintenance of a junior branch of the ghatwal's family. It has been contended on behalf of the plaintiff that it is not sufficient to show that Bunwaree Lall during his lifetime was in possession, and his legal representatives are still in possession of this subordinate tenure. But it must be established that Bunwaree Lall was and the widows are still in rightful possession of it, and that it is of a permanent nature, so that the superior ghatwal cannot at his will determine it. I think that this contention is valid. These defendants, it appears to me, are not entitled to any share in the compensation-money, if it can be shown that they are allowed to remain in possession of the subordinate tenure by mere sufferance of the superior holder, who can at any moment put an end to their possession. From the nature of the tenure held by the plaintiff, it follows that the arrangement made by his ancestor to provide for the maintenance of a junior branch of the family is not binding upon him. He is fully competent to resume possession of these lands (*vide* 6th B. L. R., page 652.)*

* 15 W. R., Civil Rul., 38.

Digitized by Google

Bunwaree Lall, therefore, not having during his lifetime any valid right to any portion of the lands taken, his representatives are therefore not entitled to receive any share in the compensation-money, the whole of which therefore should be paid to the plaintiff.

But the plaintiff is a ghatwal. His title is not that of an absolute owner. He is only entitled to enjoy the profits of the ghatwalee mehal during his life without power of alienation. The compensation-money in deposit is only a money equivalent of a portion of that mehal. He can, therefore, only enjoy its interest without any right of spending any portion of it. He is bound to keep it intact as a part of the ghatwalee property, so that his successors may obtain it, quite undiminished in value. This being the nature of his title, we ought not to declare his right to obtain this money, without imposing upon him certain conditions, for the purpose of preserving it in future as part of the assets of the ghatwalee mehal. These observations apply only to that part of the claim which represents the principal amount of the compensation-money. As to the interest which has subsequently accrued, the plaintiff is entitled to obtain it as absolute owner, because during his life he is entitled to enjoy the usufructs of the ghatwalee mehal. To guard against the contingency of this principal amount of the compensation-money being in any way wasted, I think we ought to direct that the plaintiff must give ample security to the satisfaction of the Lower Court for the due preservation of it as part of the ghatwalee property, before any decree can be given in his favor.

The case will, therefore, go back to the Lower Court with this direction that on the plaintiffs executing a valid and sufficient security to the satisfaction of that Court, for the due preservation of the principal amount of the compensation-money now in deposit in the treasury of Deoghur as part of the ghatwalee property in his possession, a decree will be drawn up declaring him entitled to obtain the whole of the money in deposit in that treasury, both principal and interest, on account of the compensation of the lands taken from his talook for public purposes.

As the plaintiff has succeeded in this suit, he is entitled to the whole of the costs of this litigation, both in this Court as well as in the Court below.

Glover, J.—I concur.

The 15th March 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Imperial Grant of Land—Pensions—Reg. XXIV of 1793—*Act XXIII of* 1871.

Case No. 59 of 1874.

Regular Appeal from a decision passed by the Judge of East Burdwan, dated the 29th December 1873.

Shahzadee Hazara Begum (Plaintiff) *Appellant,*

versus

The Collector of Burdwan and another (two of the Defendants) *Respondents.*

Messrs. J. S. Rochfort and *C. Gregory,* and *Baboo Ashootosh Dhur* for Appellant.

Baboos Unnoda Pershad Banerjee and *Mohinee Mohun Roy,* and *Moulvie Murhumut Hossein* for Respondents.

One Khajah Anwar Shahad, a servant of the Delhi Emperor, having been killed in Burdwan while fighting for his master, the Emperor built a tomb over his remains, and made a grant of land (five mouzahs) to his family for the purpose of maintaining it in the manner usual amongst Mahomedans. This grant was subsequently confirmed to a descendant of Shahad and his heirs. Some years later the land came into the possession of the Rajah of Burdwan, who paid to the grantees a certain sum of money annually; when the perpetual settlement was made, the British Government continued the payment on account of the Rajah in whose zemindaree four of the five mouzahs were incorporated. Owing to disputes in the family, a reference was made to Government, who reduced the money payment, and appointed a Mutwallee for the tomb. One of the descendants of Shahad then sued the Government, and the Mutwallee for a share of this annual payment:

HELD that the grant to Shahad's family was not a gratuitous pension or allowance, and that the money

Digitized by Google

payment by the zemindar of Burdwan was rent justly due to them for the use and occupation of their land, and that the fact of the payment being continued by Government did not alter its nature. Accordingly, the suit was not barred by Reg. XXIV of 1793, or Act XXIII of 1871.

Glover, J.—This is a somewhat peculiar case. The plaintiff claims to be a descendant of one Khajah Anwar Shahad, a servant of the Delhi Emperor, and who was killed in some local battle or skirmish against the infidels (as it is said) in the Province of Burdwan. In consideration of his services, the Emperor Farokshahur built a tomb over his remains, and granted to his family five mouzahs for the purpose of maintaining it in the manner usual amongst Mahomedans. This is said to have been in 1127 Hejra. In 1180 Hejra, or 1767 A.D., the Emperor Shah Alum confirmed the grant to Ashruf Khan, a descendant of Khajah Anwar Shahad and his heirs. Some years after this, the five mouzahs (but how there is nothing on the record to inform us) came into the possession of the local zemindar, the Rajah of Burdwan, who paid to the grantees a yearly sum of Sa. Rs. 3,690. When the British Government took possession of the country, and made a perpetual settlement with the zemindars of Bengal, it continued the payment on account of the Burdwan Rajah in whose zemindaree four of the five mouzahs were incorporated.* On the death of Ali Hossein Khan in 1268 B.S., there were quarrels in the family as to shares, and eventually the matter seems to have come before the Bengal Government, the result of which was in 1873, a considerable reduction of the money payment heretofore made, and the appointment of the defendant No. 2 as Mutwallee of the tomb. The plaintiff claims as one of the descendants of Anwar Shahad her share of the Rs. 3,690 paid by the Burdwan Rajah, and since continued by the British Government. It is unnecessary to go further into the circumstances of the case than this.

* The fifth mouzah was not returned by the Rajah, a fact commented on in the Collector's report.

The Judge held that the payment to the heirs of Anwar Shahad was an allowance payable by Government in respect of a right as explained by Section 3 Act XXIII of 1871, and governed by the provisions of Section 4 of the Act. He held that as no certificate had been furnished, the suit could not proceed, and that in any case Section 6 of the Act would prevent the Civil Court from passing any order binding the Government.

With regard to the second defendant, the Judge held that it was essential for the plaintiff to furnish the certificate specified in the Act, and that as she had not done so, her case failed.

He, therefore, dismissed her suit with costs both as against Government and as against defendant No. 2.

The question we have to decide is, whether the plaintiff's suit is barred by Regulation XXIV of 1793 or by the subsequent Act XXIII of 1871.

The Regulation of 1793, with the subsequent explanatory ones, XXIV of 1803, and VI of 1817, make use of the word pensions only; and the provisions of Regulation XXIV of 1793, are declared in Section 9 to apply only to those pensions which were heretofore paid by the landholders, and were at the time of the settlement included in the jumma of Government, and by Section 17 of the Act, the pensions and allowances referred to are declared to be gratuitous.

Act XXIII of 1871 adds to the original word pension "grant of money or land revenue "conferred, or made by the British, or the "former Government," and these words are by Section 3 made to include anything payable on the part of Government in respect of any right, privilege, perquisite, or office. As the Judge has founded his decision on the wording of this Act, it will be necessary for us to consider it, although the defendant Collector rested his case on the Regulation of 1793, and on the Sudder Dewanny Adawlut Decision of June 1853.

Was then in the first place this grant to the family of Khajah Anwar Shahad one of those discretionary allowances referred to in Regulation XXIV of 1793, which the Civil Courts are expressly forbidden to take cognizance of? The way in which the grant was originally made, and afterwards confirmed by the Delhi Emperors, has already been mentioned, and it is nowhere contended that the lands of the five mouzahs were not given as stated, nor that the grant thus made was not of the nature of a rent-free jagheer bestowed upon the family for the maintenance of the martyr's tomb. In its inception, therefore, this grant by the Delhi Emperor was certainly not a pension in the sense of the Regulation. Then did it afterwards become so? All we know of the matter is that, some years after the grant, the lands were found in the possession of the local zemindar, the Rajah of Burdwan,

Digitized by Google

who made for them a yearly payment of Rs. 3,690 (Co.'s Rs. 3,856) to the family. It is an admitted fact that this annual payment was made by the Rajah on account of these mouzahs, and it seems to us that such payment was to all intents and purposes the rent of the land transferred. It seems to have been a low rent no doubt, but it must be remembered that the times were then very troublous, and that as the imperial authority of Delhi was getting weaker, and less respected in its distant provinces, so the local power was waxing stronger, and it was not perhaps to be wondered at, if the family of Anwar Shahad were glad enough to hand over their lands to a powerful neighbour, who had the means of making their tenure a very insecure one, at a rental which the zemindar would take care to see punctually paid.

And if the Rs, 3,690 paid to the family of Anwar Shahad by the zemindar of Burdwan was the rent of the five mouzahs, how was the payment changed in its nature by being made through the British Government? That Government did no doubt look upon the payment as a pension, if not at the time, at all events afterwards, as many of the proceedings on this record show, but there really was never any enquiry into the matter; and as the recipients cared for nothing probably beyond the regular payment of their money, they never raised the question. We do not find that they were ever called upon to show the circumstances under which they gave up the lands to the Rajah in consideration of an annual money payment. It seems to have been taken for granted by Government that the allowance was in the nature of a pension, and as the then representative of the family was 80 years old and of feeble memory, there was no looking to the other side of the question. The Revenue authorities decided at once and *ex parte*, that the pension was one that might be resumed at discretion.

We have said above that there was "no "enquiry," and, we think, we are right in so saying, notwithstanding the decision of the Sudder Dewanny Adawlut on the 28th of June 1853, in the case of Surwar Hossein Khan *v.* Shomanunissa Begum. The rights of the parties to sue in the Civil Court was no doubt made the subject of one part of that decision, but the substantial questions before the Court were the right of all the members of the family to share and to the appointment to the Mutwalleeship. The Court directed the junior Government pleader to move the Board of Revenue to send up the correspondence relating to the "pension granted for the tomb of "Khajah Anwar Shahad." We do not find from the judgment that this was done, but we presume that it was, as at the hearing the Government vakeel, said that, according to his instructions, the pension, in question, was one of the discretionary allowances referred to in Regulation XXIV of 1793, of which Civil Courts were expressly forbidden to take cognizance, and the Court in its judgment declared that so much of the claim as referred to the money allowance granted by Government was barred by the Regulation.

We do not think that this is a binding judgment. There was no argument before the Sudder Court on this part of the case. The Judges on the admission of the Government vakeel, and after hearing his statement of what the Revenue authorities had done in the matter, came at once to the conclusion that the allowance was a pension, and therefore under the Regulation of 1793 a discretionary allowance merely. No issue was fixed for the determination of the point, nor so far as we can gather from the judgment, were the parties to the suit, who, however they might be squabbling about the right to share, and to the Mutwalleeship, were equally interested in making out that their allowance was not a discretionary pension, called upon to support their own view of the case. We do not think, therefore, that the decision of the Sudder Court in 1853, concludes the plaintiff in this suit, and as to the decision itself we must venture with great respect for the Judges who passed it, to think it was wrong. It cannot, we conceive, be said that the payment made by the Rajah of Burdwan to the family of Anwar Shahad was a pension, even if the Government payment were one, and the Regulation of 1793 only applies to pensions paid by landholders. We have already given our reasons for holding that the payment by the Burdwan zemindar was rent.

Moreover, the Regulation refers to pensions or allowances which are gratuitous, but surely this payment to Anwar Shahad's family ought not to be called so. The man lost his life, fighting the battles of his master, the Delhi Emperor, and the grant of lands since transmuted (if it has been transmuted) into a money allowance by a third party, cannot be said to have been a gratuitous benefit. If ever there was consideration for a grant, it was in this case.

Digitized by Google

With reference to the allegation, that the payment was added to the zemindar's settlement, we may remark that by Section 34 Regulation VIII of 1793, only public pensions were allowed to be so added, and it has never been contended that the payment to Anwar Shahad's family by the Rajah of Burdwan was a public pension.

The Judge below holds that the payment by Government was an allowance in respect of a right. In one sense perhaps it might be, as the privilege to receive rent is a right belonging to the owner of the land, and the rent would therefore be a payment on account of that right, but we do not take this to be the meaning of Section 3 Act XXIII of 1871.

Neither do we think that Section 4 of that Act applies to this case. If we are right in saying that the payment on account of the tomb was not a pension, was it a grant of money or of land revenue? was it a commutation allowance in respect of any privilege, perquisite, or office? For the reasons given above we consider that the money paid by the Rajah of Burdwan was in the nature of rent justly due to the Shahad's family for the use and occupation of their five mouzahs, and that the fact of the payment being continued by Government does not alter its nature, or make it any the less rent. There is nothing to show that any enquiry was made at the time of the settlement as to the right to include this payment in the jumma. The Board of Revenue seem to have acted entirely on *ex parte* information, and no enquiry was made at the time when the circumstances were probably within the remembrance of living persons. In 1838 the representative of the family was a very old man, and had apparently forgotten all about the matter.

We think that the plaintiff's suit is not barred either by Regulation XXIV of 1793, or by Act XXIII of 1871, and that the Judge's order should be reversed with costs (of appeal). Whether the plaintiff has suffered her claim to be barred by limitation, and whether she is one of the descendants of the Khajah Anwar Shahad entitled by Mahomedan law to share in the grant, are questions to be decided in the Court below. But in any case we should suppose that the plaintiff would not be entitled to a decree for any specific share. The grant was by its nature impartible and could only be used jointly by the family for the purposes mentioned in the sunnud.

The 15th March 1875.

Present:

The Hon'ble W. F. McDonell, *Judge.*

Joint Family Property—Limitation—Onus Probandi.

Case No. 1394 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 16th April 1874, modifying a decision of the Extra Moonsiff of Manickgunge, dated the 30th August 1873.

Kristo Chunder Burmo Surmah and another (Plaintiffs) *Appellants,*

versus

Mohesh Chunder Burmo Surmah and others (Defendants) *Respondents.*

Baboo Nullit Chunder Sen for Appellants.

Baboo Doorga Mohun Doss for Respondents.

In a suit by a member of a joint Hindoo family to recover possession of a share of the ancestral property where limitation is pleaded, the onus is on the plaintiff to prove possession in some way within 12 years.

THIS was a suit for the recovery of four-fifths of ancestral property, the plaintiffs basing their claim as being sons of one Byddo Nath who himself derived title from his brothers Shumbhoo Nath, Kashee Nath, and Gunga Gobind, and also upon their own right in the ancestral property. The defendants set up the statute of limitation in bar of the suit, and on the merits said that Kashee Nath, Gunga Gobind and Gooroo Pershad had long separated from the other two brothers. The first Court decreed the plaintiffs' claim in full. The Lower Appellate Court came to the conclusion that the plaintiffs were entitled to a share of 10 annas, but that they could not recover more than a 4 annas share, being barred by limitation as to the rest. Both the parties appeal against this decision. On the appeal of the plaintiffs, it is urged that the Lower Appellate Court is in error in holding that the plaintiff's claim is barred by limitation; that the suit being for possession of a share of the dwelling-house of a joint Hindoo family, there was no adverse possession at all so as to make the statute of limitation applicable to the case. It is also urged that the nature of the property was such as that the exercise of proprietary right was impossible, but from the evidence of the plaintiffs' witnesses it is clear that they considered that it was quite possible and that they tried to prove

Digitized by Google

the exercise of that right, but failed to do so. The ruling in XII B. L. Reports, page 219,* shows that it is not sufficient for a plaintiff merely to say that the property is joint family property, but that the onus is on him to prove possession of it in some way within 12 years. This in the present case the plaintiffs have failed to do, and consequently, I think, their claim has been rightly held to be barred by limitation.

In cross-appeal it is urged that the Lower Appellate Court has thrown the onus on the wrong party, and that it was for the plaintiffs to prove the possession of Kashee Nath's widow within 12 years. This contention is correct, and there is no doubt that, on reading the whole decision, it appears that the Subordinate Judge was inclined to throw the onus on the wrong party, yet when it is seen that the Subordinate Judge does believe implicitly the evidence of the plaintiffs' witnesses, and those witnesses have deposed to the possession of Kashee Nath's widow within 12 years, I think it may be held that the Subordinate Judge has virtually come to a finding that Kashee Nath's widow has, from the evidence on the record, been proved to have been in possession within 12 years. The appeal is dismissed with costs, and the cross-appeal is also dismissed.

The 16th March 1875.

Present :

The Hon'ble A. G. Macpherson, *Officiating Chief Justice*, and the Hon'ble E. G. Birch, *Judge*.

Mortgaged Property—Registered Deed of Sale.

Case No. 2743 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 27th September 1873, *modifying a decision of the Moonsiff of Pursa, dated the 29th June* 1872.

Puluck Dharee Roy and others (some of the Defendants) *Appellants*,

versus

Mohabeer Singh (Plaintiff) *Respondent*.

Baboo Mohesh Chunder Chowdhry for Appellants.

Moonshee Mahomed Yusoof for Respondent.

A party purchasing mortgaged property, after a suit has been instituted to enforce the mortgage, takes nothing as against the mortgagee, or as against one who claims under a decree which directs the sale of the property in satisfaction of the mortgage, even though the deed of sale is registered, and the mortgage (which was for less than Rs. 100) was not registered.

Macpherson, C.J.—We think that the judgment of the Lower Appellate Court ought to be set aside. The plaintiff comes into Court claiming this property under a purchase made by him on the 14th of June 1869. He alleges that the principal defendant is in possession as purchaser on the 28th of May 1870 at a sale held in execution of a decree of the 18th of March 1870 made in a suit instituted on the 1st of June 1869, to realize the amount due on a mortgage of this property, dated the 7th of September 1868. The plaint is based entirely upon fraud, the plaintiff contending that the mortgage and all the proceedings under it, including the purchase by the defendant, were fraudulent and collusive, and ought therefore to be set aside. On these grounds he sought to recover possession, although his purchase is later in date than the alleged mortgage, the foundation of the defendant's title.

The suit went to trial in the Court of the Moonsiff upon the issues as to fraud and collusion ; and the Moonsiff came to the conclusion that the mortgage and the proceedings thereunder were not fraudulent. It is difficult to understand how he could have come to any other conclusion so far as the plaintiff was concerned ; for not only was the mortgage executed many months before the sale to the plaintiff, but the suit upon the mortgage was actually instituted fourteen days prior to the date of the sale.

The suit having been dismissed by the Moonsiff, the Subordinate Judge reversed his decision upon the ground that the mortgage of the 7th of September 1868 was not registered, whereas the bill of sale in favor of the plaintiff of the 14th of June 1869 was. And although the mortgage being for less than Rs. 100 registration was not imperative, the Subordinate Judge considered that preference ought under the Registration Acts to be given to the bill of sale.

It seems to us that, under the circumstances, no question of priority really arises in this case from the fact of the mortgage not having been registered.

The bill of sale to the plaintiff was neither executed nor registered until after the suit had been instituted to enforce the mortgage. And purchasing at such a time, the purchaser took nothing as against the mortgagee, or as against the defendant claiming under him

* 19 W. R., Civil Rul., 192.

Digitized by Google

and under the decree which directed the sale of this property in satisfaction of the mortgage.

It seems to us clear that the plaintiff has no right to interfere with the possession of the defendants. The appeal will be allowed, and the plaintiff's suit dismissed with all costs.

The 16th March 1875.

Present :

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Analogous Suits—Consent.

Case No. 880 of 1874.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 17th December 1873, *modifying a decision of the Moonsiff of Madhepoora, dated the 23rd June* 1873.

Luchmun Prithee Mundul (Defendant) *Appellant,*

versus

Kooer Sree Nundun Singh (Plaintiff) *Respondent.*

Baboo Boodh Sen Singh for Appellant.

Moonshee Mahomed Yusoof for Respondent.

Where parties to other suits agree to abide by the result of the decision in one, the suits should be analogous, so that one decision might decide all the questions at issue.

Glover, J.—This case must be remanded to the Lower Appellate Court in order that the Judge may decide on the issues which properly arose in the appeal before him. There were several appeals said to be analogous before him at the same time, and the Judge in deciding the appeal No. 480 adds to his order that "appeals Nos. 474, 479, 481, 482, and others will follow this decision." The present special appeal is against the order of the Judge in appeal No. 482. The question in the case now before us is what was the proper amount of rent leviable by the plaintiff upon the lands held by the defendant. The Moonsiff came to a decision upon the evidence on that point; but the decision of the Judge in appeal No. 480 turns entirely upon a different point. The question between the parties to that case was whether a certain bhowlee rent was leviable or not, and also as to the extent of that rent. The Judge decided that issue, and against that decision apparently there has been no appeal; but the question which is to be decided in this case, and which the Judge says was decided by his order in appeal No. 480, was as a matter of fact not decided at all. We do not know what decision the Judge came to upon the evidence in this case, or whether he disagreed with the Moonsiff in his estimate of that evidence. It might possibly be that the parties to the suit agreed to abide by the result of the decision in one case, but in such cases it is necessary that the suits should be analogous, so that one decision might decide all the questions at issue. As we have said before, the Judge's order in appeal No. 480 was as to the amount of bhowlee rent, whilst the point to be decided in this case was what was the amount of nukudee rent payable by the defendant to the plaintiff. We remand the case to the Judge for a proper decision in appeal No. 482 of 1873 before him. Costs to follow the result.

The 16th March 1875.

Present :

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Act VIII (B.C.) 1869 *s.* 27—*Ejectment.*

Case No. 786 of 1874.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 31st December 1873, *modifying a decision of the Additional Moonsiff of Begoosurai, dated the 31st March* 1873.

Mr. L. G. Crowdy (Defendant) *Appellant,*

versus

Ram Bhurosee Chowdhry and others (Plaintiffs) *Respondents.*

Mr. M. L. Sandel for Appellant.

Baboo Boodh Sen Singh for Respondents.

In a suit for possession of a piece of land alleged to have formed a part of plaintiff's tenure, of which he was dispossessed by the defendant (his zemindar), the Lower Appellate Court, although it found that the land in suit was not a portion of that tenure, yet gave plaintiff a decree as defendant had taken the law in his own hands:

Held that the judgment was erroneous in law. The suit had been brought under Act VIII (B.C.) of 1869 s. 27, and it was for plaintiff to prove that the land was a part of his tenure, and that he had been illegally ejected.

Mitter, J.—In this case the plaintiff sued for possession of 32 beegahs of land, alleging

Digitized by Google

that it is a part of a tenure consisting of 120 beegahs, and that he was dispossessed by the defendant, who is only entitled to receive rent of the land in dispute. The defendant alleged that the plaintiff was not dispossessed from any portion of his tenure consisting of 120 beegahs; that he was in possession as a trespasser of the land in suit; and that he, the defendant, as zemindar, is perfectly entitled to resume possession of such land. The Moonsiff decreed the plaintiff's claim, finding that the 32 beegahs claimed in this suit form part of the plaintiffs' tenure consisting of 120 beegahs. On appeal, the District Judge has set aside this finding. He has come to the conclusion that the land in suit is not a portion of the original tenure of the plaintiff consisting of 120 beegahs. But notwithstanding this finding, he is of opinion that, as the defendant has taken the law in his own hands and dispossessed the plaintiff, he is entitled to a decree, and he has accordingly confirmed the decree of possession made by the Court of first instance. We think that this judgment is erroneous in law. The suit was brought under the provisions of Section 27 of Act VIII (B.C.) of 1869. It, in fact, was a suit which was contemplated by Clause 6 Section 23 Act X of 1859. In a suit of this nature, it is for the plaintiff to prove that the land which he seeks to recover is a part of his tenure, and that he has been illegally ejected. In this case the District Judge comes to a distinct finding that the land claimed is not a part of the original tenure of the plaintiff consisting of 120 beegahs. Having found that, he further says that it may be an accretion to his original holding, but he thinks that it is not necessary to come to any conclusion upon that point. We think the Judge was wrong in taking this view of the case. From the nature of the suit, the plaintiff cannot obtain a decree unless that question is found in his favor. For that reason it would have been necessary for us to remand this case to the District Judge to find whether the plaintiff has given any proof of the fact that the land in dispute is an accession to his original tenure. But we are informed by the pleader for the respondent that there is no evidence to prove this fact, and therefore it is unnecessary to remand this case for that purpose. The plaintiff not having given any evidence to prove that he has been in possession of the land in dispute as tenant, and his original case,—namely, that it was a part of his original holding consisting of 120 beegahs having been found to be not established, the suit must be dismissed with costs. We accordingly reverse the decree of the Lower Appellate Court, and dismiss the plaintiffs' suit with costs in all the Courts.

The 16th March 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Act XXVII of 1860—*Certificate of Administration—Strangers.*

Case No. 14 of 1875.

Miscellaneous Regular Appeal from an order passed by the Judge of East Burdwan, dated the 14*th December* 1874.

Hur Narain Singh Baboo (Objector) *Appellant,*

versus

Keshub Lall Seth Tulwar (Petitioner) *Respondent.*

Baboo Ashootosh Mookerjee for Appellant.

Baboo Mohendro Lall Mitter for Respondent.

Where an applicant for a certificate under Act XXVII of 1860, was seventh in descent from a common ancestor through the female line, and therefore not a bundhoo: HELD that he was no relative of such ancestor, and no heir to the deceased, and was not entitled to a certificate.

Glover, J.—THIS was an application under Act XXVII of 1860 for a certificate to collect debts due to estate of Huree Singh. Huree Singh died some years ago, and was

Digitized by Google

succeeded in his property by his only child, a daughter, Khettermonee. On her death without issue, the present application was made.

The petitioner is a distant member of the family of the common ancestor Suntosh Singh, the objector is a shebait, to whom Khettermonee is said to have given the estate of her father in trust for the worship of the gods.

The Judge has found that, as the petitioner comes of the same stock as Huree and Khettermonee, he has a *primâ facie* right to a certificate over a stranger who is *primâ facie* in possession wrongfully, Khettermonee having no power to give away the family property in endowment.

The Judge's order is one which, speaking for myself, I am sorry to be obliged to interfere with, but I am bound to say that the petitioner has not set out any title to obtain the certificate he desires, as required by Act XXVII of 1860. We have heard a long and abstruse argument on the subject, but I am not convinced by it, that the petitioner *is in* any way related to the deceased or her father, and no other title to the certificate is alleged. He is seventh in descent from Suntosh through the female line, and would not therefore be a bundhoo. By the law of the Mitakshara, which admittedly governs this case, he would not be entitled to present funeral oblations to any ancestor beyond his maternal grandfather, his father, and again his father, so that he would be no relative of Suntosh Singh, and no heir to Huree. He is, according to Hindoo law, a stranger to the family, and has no more claim to the certificate than any other stranger.

We have not been shown what his debts are, which the petitioner wishes to collect, nor as a matter of fact has it been proved that there are any debts. The objector may have an equally bad title to collect them, and any one who pays to him will do it at his peril; but he is in possession of the property, and the object of the petitioner getting a certificate is to make what he supposes will be evidence in the regular suit which will no doubt be brought.

I am not quite sure from the Judge's decision whether Hur Narain Singh, the objector, applied for a certificate or not, but in any case I should not think it right for him to have it any more than for Keshub Lall Seth Tulwar.

I think that the order of the Judge must be reversed. Costs one gold mohur.

The 17th March 1875.

Present:

The Hon'ble W. F. McDonell, *Judge.*

Act VIII (B.C.) of 1869 *s.* 102—*Rent Suit—Appeal—Instalments.*

Case No. 1563 of 1874.

Special Appeal from a decision passed by the Officiating Judge of the 24-*Pergunnahs, dated the* 29*th April* 1874, *affirming a decree of the* 1*st Moonsiff of Diamond Harbour, dated the* 30*th August* 1873.

Peari Mohun Mookhopadhya (Plaintiff) *Appellant,*

versus

Madhub Chunder Baboo and others (Defendants) *Respondents.*

Baboo Ashootosh Mookerjee for Appellant.

Baboo Umbica Churn Bose for Respondents.

A rent suit, in which there is no dispute as to the amount of the jumma, and the only question is whether it is to be paid in instalments or in a lump sum, cannot be said to involve a question of right to enhance or vary the rent.

In this case a preliminary objection has been taken by the respondent's vakeel that, inasmuch as the claim was below Rs. 100, no appeal lay to this Court under Section 102 Act VIII (B.C.) of 1869. On the part of the appellant it is urged that, although the rent claimed in the suit was under Rs. 100, yet as the plaintiff claimed a larger amount of jumma than the defendant said he was bound to pay, under the ruling of the High Court quoted in 19 W. R., page 92, an appeal would lie. On perusal of that decision it appears that in that case there was a question raised as to the amount of the jumma. The plaintiff attempted to vary the jumma hitherto paid by the ryot, the ryot resisted the attempt, and the amount of the jumma was the subject of a decision which was given in favor of the ryot. In the present case there was no dispute as to the amount of the jumma. Both the parties admit it to be Rs. 12 a year. The only question was whether it was to be paid by instalments or in a lump sum. And the only question that the Judge says was before

Digitized by Google

him was whether defendant was liable for interest on the unpaid instalments of rent. The Judge decided that, as the kubooleut was not proved, he could not interfere with the Moonsiff's order as to interest. This can hardly be said to be a case which involved a question of right to enhance or vary the rent of a ryot, and holding that Section 102 does apply to this case, this appeal is dismissed with costs.

The 17th March 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Suit by Co-sharer—Possession—Wassilat.

Case No. 502 of 1874.

Special Appeal from a decision passed by the 2nd Subordinate Judge of Bhaugulpore, dated the 16th December 1873, modifying a decision of the Additional Moonsiff of Begoosurai, dated the 28th March 1873.

Chundee Chowdhry (Plaintiff) *Appellant,*

versus

Mr. Macnaghten (Defendant) *Respondent.*

Mr. C. Gregory and *Baboo Debendro Narain Bose* for Appellant.

Mr. M. L. Sandel for Respondent.

A suit by a shareholder for possession of a share of landed property is liable to dismissal if all the co-sharers are not made parties, but his claim for damages in the shape of wassilat is not so liable.

Mitter, J.—In this case, the plaintiff sued to recover one third share of 24 beegahs of land, alleging that it belongs to him and his co-sharers, and that the defendant having taken a ticca lease from some of the shareholders, has dispossessed the plaintiff, and is in exclusive possession of it by sowing indigo thereon. The suit was brought for possession of one-third share of the land and also for wassilat from the date of dispossession. The defendant pleaded that the whole quantity of the land, namely, 24 beegahs, was never in the khas possession of the proprietors, but that it was in the possession of a number of tenants, and that he, the defendant, with the consent of those tenants, has been sowing indigo upon a portion of the land. The Court of first instance decreed the plaintiff's claim, and in the decree the Court directed that the amount of wassilat claimed by the plaintiff should be ascertained in execution of the decree. On appeal the plaintiff's claim for possession and wassilat has been dismissed, and a modified decree has been given, by which the defendant is prohibited in future from exercising his exclusive right over the disputed land by sowing indigo. Whether that decree is right or not we have nothing to do with in this special appeal, as that decree has not been questioned before us. The plaintiff has preferred this special appeal against that part of the judgment of the Lower Appellate Court by which his claim for possession and wassilat has been dismissed. It appears that the Subordinate Judge has based his judgment upon the ground that all the co-sharers are not parties to this suit. We think that this ground is sufficient to dismiss the plaintiff's suit for possession of the one-third share of the land in suit, but we do not think that it is sufficient to dismiss the plaintiff's claim for damages in the shape of wassilat. The plaintiff's cause of action as regards damages was only against the defendant, who, as the plaintiff alleges, has been in exclusive possession of his share of the land by sowing indigo thereon. Therefore, the Subordinate Judge ought to have inquired into the question arising upon the statements of the parties in respect of this part of the claim. We therefore remand the case to the Lower Appellate Court, with directions to determine the question which arises on the defence with reference to the claim of wassilat and upon the result of that investigation to pass a decree which the evidence on the record may warrant. Costs to follow the result. We think it right to make this observation for the guidance of the Lower Appellate Court that the plaintiff is not entitled to recover from the defendant the value of any share of the produce of the indigo plants. According to the Full Bench decision, reported in IX Weekly Reporter, page 445, all that he is entitled to is his share of the fair and reasonable rent at which the land could have been let out.

Glover, J.—I concur.

Digitized by Google

The 17th March 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Ejectment—Right of Occupancy.

Case No. 411 of 1874.

Special Appeal from a decision passed by the 2nd Subordinate Judge of Bhaugulpore, dated the 27th November 1873, *modifying a decision of the Officiating Additional Moonsiff of that district, dated the 28th July* 1873.

Mr. W. S. Crowdy (Defendant) *Appellant,*

versus

Jhukree Dhanook (Plaintiff) *Respondent.*

Moonshee Mahomed Yusoof for Appellant.

No one for Respondent.

A tenant, suing to recover possession of an old jote from which he has been dispossessed by his landlord before the termination of his tenancy, is not required to prove a right of occupancy.

Glover, J. — THIS was a suit by the plaintiff to recover possession of what he calls his Kast Kudimee land from which he had been dispossessed by the defendant in Kartick 1278. The defendant denied the tenancy of the plaintiff. He denied that the plaintiff was in possession of the land, and he also denied that he had dispossessed him. Both the Courts below found for the plaintiff. In special appeal it is contended that, before the plaintiff could be restored to possession, it was necessary for him to prove that he had a right of occupancy. We think that this was not necessary. The plaintiff, suing for recovery of possession of what is called an ancient jote, is met by the landlord who denies his tenancy altogether, and it has been found as a fact by the Subordinate Judge that the plaintiff had held the land in question as an old tenant, and that he was ousted from it by the defendant. If the question had been as to whether the tenancy had been terminated by efflux of time, and that by reason of that termination the zemindar had a right to evict the tenant, then the question of right of occupancy would have been material. But in this case it seems to me that the only thing which the plaintiff had to prove was that he had an old jote on the land in question and that he had been turned out, there being nothing on the part of the defendant to show that the tenancy of the plaintiff had been terminated. We have been referred to a Full Bench decision, to be found in IX Weekly Reporter, page 513. But the judgment in that case went entirely upon the fact that there was a tenancy, and that the zemindar after that tenancy was terminated did not apply to the Collector to eject the ryot. It likewise went on to say that, if a landlord ejects a ryot of his own authority, the ryot would have a right to bring a suit against the zemindar under the provisions of Section 15 Act XIV of 1859. So far, therefore, from assisting the special appellant in this case, it seems to me to go directly against him. Here, as I have said before, it has been found as a fact that the plaintiff had held this jote for a long time, and that he was dispossessed by the defendant in Kartick 1278. It appears to me that he was to prove only these two things, and that unless the special appellant proved that the tenancy had been terminated, the plaintiff would be entitled to a decree. The special appeal is dismissed but without costs, no one appearing for the respondent.

Mitter, J.—I concur.

The 18th March 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Act XI of 1859 *s.* 37.

Case No. 564 of 1874.

Special Appeal from a decision passed by the 2nd Subordinate Judge of Bhaugulpore, dated the 15th December 1873, *affirming a decision of the Additional Moonsiff of that district, dated the 31st March* 1873.

Bool Chand Jha (one of the Defendants) *Appellant,*

versus

Luthoo Moodee and another (Plaintiffs) *Respondents.*

Baboos Nil Madhub Sen and *Hureehur Nath* for Appellant.

Mr. M. L. Sandel for Respondents.

A landlord cannot, by planting a garden in any portion of his estate, become, *quoad* such plantation, his

Digitized by Google

own ryot, so as to bring the land so planted under the protection of Act XI of 1859 s. 37, in the event of his estate being sold for arrears of revenue.

Glover, J.—THERE is no ground whatever for this special appeal. The plaintiff was a purchaser at a sale for arrears of Government revenue of an eight-anna share of the defendant No. 1's right in a garden which was admittedly planted by him. The plaintiff says that the defendant No. 2, who was a servant of the defendant No. 1, dispossessed him in Bysack 1273. The defendant No. 2 alleges that he bought the property from the defendant No. 1 on the 11th January 1866,—that is, two days before the revenue sale, which took place on the 13th January 1866, and that he has been in possession ever since, and has paid rent to the plaintiff. Both the Courts below found that the deed of sale, which the defendant No. 2 put forward as his document of title, was a collusive transaction between him and the defendant No. 1, the defaulting landlord, and accordingly dismissed the suit.

The first objection taken in special appeal is that the defendants' case comes under the 4th Clause of Section 37 of the Sale Law (Act XI of 1859), and that the purchaser would not be entitled to take possession of this mango garden. Now, in the first place, Section 37 refers to purchasers of entire estates, and this is from the defendant's own showing a share only in the whole estate; in the next place the clause in question refers to leases of lands whereon gardens have been planted. The special appellant's pleader contends that if a zemindar chooses to plant gardens of mango and other trees upon any portion of his estate, he becomes, *quoad* those plantations, his own ryot, and that if his estate is sold for arrears of Government revenue, he can bring this land under the operation of Section 37 and get it protected from sale. It is only necessary to say that no authority has been shown for this, and it appears to us to be untenable. The question between the parties was whether before the auction-sale took place, the zemindar had sold this particular property to the defendant No. 2, and it has been found by both the Courts below that there was no real sale, and that at the time of the auction-sale the property was in the possession of the defaulting zemindar.

Another objection has been taken to the effect that as the plaintiff received rent for this garden from the defendant No. 2 after the date of his dispossession, that is sufficient to prevent him from taking khas possession of the land. Now there was no is fixed or tried by the Moonsiff on the po nor do we find that, although there is s mention of the circumstance in the writ statement, any application was made to Moonsiff to fix or try that issue. Neither there any objection to be found in the p tion of appeal made to the Judge. objection appears to be quite an after-thou brought forward at the last stage of spe appeal.

The appeal is dismissed with costs.

The 19th March 1875.

Present:

The Hon'ble E. G. Birch and W. F. McDonell, *Judges.*

Suit for Ejectment—Onus Probandi.

Case No. 911 of 1874.

Special Appeal from a decision passed the Subordinate Judge of Hooghly, da the 29th December 1873, *reversing decision of the Moonsiff of Seramp dated the 22nd May* 1873.

Bissambhur Banerjee (Plaintiff) *Appell versus*

Koylash Chunder Bose (Defendant) *Respondent.*

Baboo Gopee Nath Mookerjee for Appellant.

Baboo Bhyrub Chunder Banerjee for Respondent.

The purchaser of an estate at a sale for arrea revenue, after withdrawing a suit for arrears of sued to eject the defendant from a piece of lan which his homestead was, *i.e.*, to declare the liable to assessment and to obtain khas possession:

HELD that the onus lay with the plaintiff to p that the land was mâl, and that he and his predece had received rent for it.

Birch, J.—THE plaintiff sues to e the defendant from one beegah ten cot

Digitized by Google

of land on which his homestead is, on the allegation that the land falls within the ambit of the estate he has purchased at a sale for arrears of revenue, and that the defendant denies his title thereto and refuses to pay him rent. He had brought a previous suit against the defendant for arrears of rent, but had withdrawn it, and he now sues not to declare the land liable to assessment, but to obtain khas possession thereof. The Moonsiff treated the case as a suit for resumption of a plot of rent-free land, and ruled that the defendant was bound to prove that he had held the land as lakheraj from 1790. The Moonsiff considered that the defendant had failed to discharge the onus of proving this, and he gave the plaintiff a decree for ejectment.

Upon appeal the Subordinate Judge was of opinion that the Moonsiff had misconceived the case. The Subordinate Judge says :—"Plaintiff having withdrawn his case "has instituted this suit to establish that the "land was mâl, and that from it rent was "before collected. The onus of proof in "this case is with the plaintiff, who must "make out his case." He then discusses the evidence and comes to the conclusion that plaintiff has failed to prove that the land is part of his mâl estate, and dismissed the suit.

In special appeal it is contended that the Subordinate Judge has improperly laid the onus of proof upon the plaintiff, and that he has not allowed due weight to some chittahs which are on the record.

We think that the Subordinate Judge has taken a correct view of this case in holding that it is for the plaintiff to prove that he or his predecessors have received rent for the land in the possession of the defendant. The Subordinate Judge has found upon the evidence that the plaintiff has failed to prove what was required of him. We cannot go into the evidence, this being a special appeal. We must accept the finding of the Subordinate Judge upon the evidence.

The Subordinate Judge was justified in refusing to consider the document which is called a chittah in any way as proving plaintiff's case—the copy of the abstract which is put forward as part of a chittah is of no use to any one, and upon the reverse of the copy it is recorded that the measurements had been set aside as incorrect.

We think that there is no error of law in the Subordinate Judge's decision, and we dismiss the special appeal with costs.

The 25th January 1875.

Present :

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Joinder of Causes—Act VIII of 1859 *ss.* 8 *&* 9.

Case No. 207 of 1873.

Regular Appeal from a decision passed by the Subordinate Judge of Furreedpore, dated the 27th June 1873.

Tara Prosunno Sircar and others (Plaintiffs) *Appellants,*

versus

Koomaree Debee and others (Defendants) *Respondents.*

Baboos Sreenath Doss and *Taruck Nath Paleet* for Appellants.

Baboos Mohinee Mohun Roy, Chunder Madhub Ghose, Rash Beharee Ghose, Doorga Mohun Doss, and *Kashee Kant Sen* for Respondents.

In a suit where there are several distinct causes of action, a Court is competent to try them together against the same defendants; but not as against several defendants.

Jackson, J.—THE plaintiff brought this suit against a large number of defendants to recover possession of a quantity of land of which possession had been awarded to the defendants by an order of the Magistrate under Section 318 of the Code of Criminal Procedure of 1861. It was objected to the suit that the several defendants were not concerned in the whole of the land to which the suit related, each set of defendants having only claim in respect of a portion of the land as awarded to them by the Magistrate. The Subordinate Judge, upon that objection to the suit, observed that there were several precedents quoted before him on this point; that these precedents were not uniform, as in some the Judges rejected the plaint upon such objection, in others, instead of rejecting it, they finally tried and determined the suit as it stood; but he ultimately gave judgment against the plaintiffs, on the ground that the previous suit and decree on which the plaintiffs relied had become infructuous, and that, under the circumstances as he said, "there was no chance of plaintiffs' success either on limitation or on the merits." The plaintiffs have appealed to this Court, and the same objection has

Digitized by Google

been renewed. The plaintiffs have taken the wise course of applying to be allowed to withdraw the suit, and we accordingly allow it to be withdrawn under Section 97 of the Civil Procedure Code. The plaintiffs will pay to the several defendants the costs which they have respectively incurred.

We desire to point out, for the guidance of the Lower Court, that the Subordinate Judge seems to have misconceived the extent of his powers in this matter. He says :—"In this case evidence having been gone "into, I would prefer trying each cause of "action against each defendant separately, "if need be, instead of rejecting the plaint on "the ground of misjoinder or multifarious-"ness." He seems to consider that it was simply a matter of convenience, and that if he were disposed to try the causes of action against all the defendants together in one suit, he would be at liberty to do so. This is a misconception. Section 8 Act VIII of 1859 provides :—"Causes of action by and "against the same parties, and cognizable by "the same Court, may be joined in the same "suit." And Section 9 says :—"If two or "more causes of action be joined in one suit, "and the Court shall be of opinion that they "cannot conveniently be tried together, the "Court may order separate trials of such "causes of action to be held." What the Subordinate Judge professed himself ready to do would have been quite proper if the suit had been on several distinct causes of action and against the same, but not as against several, defendants.

[PRIVY COUNCIL JUDGMENT.]

The 27th February 1875.

Present :

Sir James W. Colvile, Sir Montague E. Smith, and Sir Robert P. Collier.

Account Books—Evidence—Onus Probandi—Proof of Signatures.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Baboo Gunga Persad and another

versus

Baboo Inderjit Singh and another.

Where the fact of payments by a banking firm is distinctly put in issue, the books of the firm being at most corroborative evidence, the mere general statement of the banker to the effect that his books were correc kept is not sufficient to discharge the burden of pr that lies upon him; particularly, if he has the means producing much better evidence.

In a suit to recover monies unaccounted for, wh defendants plead payments endorsed on documents, t the endorsements purport to have been signed by plaintiffs, the formal and regular method of proc to call on the plaintiffs to admit or deny their signatu and then to call upon witnesses to state whether th saw the plaintiffs sign or could speak to the handwrit or generally what took place.

THE appellants in this case are bank in the district of Monghyr, and the respon ents, who were the plaintiffs in the actio are zemindars resident in that district. Th appear to have been in embarrassed circu stances, many decrees having been recover against them. In this state of things th borrowed, as is admitted, from the respon ents, Rs. 29,000 upon a zurpeshgi lea the effect of which may shortly be stat to be that it was a lease for 15 years a rent calculated to cover the interest on t Rs. 29,000 at nine per cent., and also t Government revenue payable on the proper leased, the lessees and mortgagees unde taking to keep down the Government revenu and to pay themselves such interest, a being at liberty to make what further prof they could out of the zurpeshgi, or farmi lease. At the end of the 15 years t principal sum was to be paid down in lump sum and the property redeemed. Th was the mortgage transaction. It is, ho ever, admitted that it was further arrang between the parties that this sum Rs. 29,000 should not be paid by t mortgagees, the bankers, into the hands the mortgagors, but should be transferred their account in the books of the firm to be applied, as occasion should require, satisfaction of their judgment and oth debts. The result of that arrangement w to make the bankers accounting parties the plaintiffs for Rs. 29,000.

It was, however, alleged by the plaintif though the transaction is denied by t defendants, that the Rs. 29,000 provi insufficient to pay all the debts that we to be paid, one of the plaintiffs, Bidyanu Singh, borrowed from his father-in-law further sum of Rs. 3,157-8, and paid it in the bank, the bankers giving a deposit no in the name of the father-in-law, but treati the money as the money of the plaintiffs, o at all events, of Bidyanund Singh. Th effect of this transaction, if it did take plac was of course to increase the sum for whi the bankers were accountable by the amou of the further deposit.

* From the judgment of Phear and Morris, JJ., dated 16th July 1873.

Digitized by Google

That being the position of the parties, the plaintiffs brought their suit, in which they claimed upwards of Rs. 10,000 as unaccounted for. They gave credit for admitted payments on their account to the amount of upwards of Rs. 22,000, and claimed the difference between that sum and the original Rs. 29,000. *plus* the Rs. 3,157-8, with interest. Therefore, as Mr. Justice Phear has observed, it lay upon the plaintiffs to prove the payment of the additional sum of Rs. 3,157-8; and it lay upon the defendants to disprove that payment, if the other side succeeded in establishing a *primâ facie* case against them; and in any case to account for so much of the Rs. 29,000 as the plaintiffs did not admit to have been paid.

In the Court below the Subordinate Judge seems to have considered that the plaintiffs' case was wholly false, and the defendants' case wholly true, and to have dismissed the suit. It went on appeal to the High Court; and the learned Judges there considered it to have been very unsatisfactorily tried in the Lower Court. They doubted whether it would not be proper, in the circumstances of the case, to remand it for re-trial; but ultimately came to the opinion that after making one small allowance in favor of the defendants, they ought to give the plaintiffs a decree for the amount claimed. It is against that decree that the present appeal has been brought, which has imposed upon this Board functions which it is not often called upon to exercise, namely, those of settling the items of a disputed account.

Their Lordships are disposed to concur generally with the High Court in the conclusion to which they came, that the case was unsatisfactorily tried by the Subordinate Judge, and that his decree cannot stand. The evidence which he seems to have considered sufficient to prove the payments which the defendants were bound to prove, consisted of the mercantile books of the banking firm and of a general statement by the defendant Gunga Persad that the items in those books were correct. Their Lordships are of opinion that the books being, as is admitted, at most corroborative evidence, the mere general statement of the banker, where the fact of the payments was distinctly put in issue, to the effect that his books were correctly kept was not sufficient to satisfy the burden of proof that lay upon him, particularly as with respect to many of the disputed items he had the means of producing much better evidence.

Again, the documentary evidence on which the defendants' case principally rested consisted of the two amanutnamas at pp. 40 and 45 of the Record, and the endorsements of payments thereon, which purported to have been signed by the plaintiffs; because these, if really signed by them, were proof of settled accounts comprehending most of the disputed payments. In this country, or in any country where the administration of justice is conducted with any degree of formality and regularity, one would have expected to find that these documents had been put into the hands of the plaintiffs; and that they had been called upon to admit or deny their alleged signatures, and that the proof of these documents to be given by the defendants would have been far more specific than a mere statement that they were identified and verified, as the Judge says, by the witnesses; the witnesses would have been called upon to state whether they saw Bidyanund Singh sign the first, or Bidyanund Singh and Inderjit sign the second, or, if not, whether they could speak to the handwriting and generally what took place on the two occasions on which the accounts are vaguely said by one of the witnesses to have been adjusted. Those amanutnamas, it may be remarked, were important, not merely by way of admissions of the actual sums that were therein stated by the endorsements to have been paid, but also as admissions of the liability for the rent and of the transfers of a balance of account into the joint names of Addyanund and Hunsraj, and of another and subsequent balance into the separate names of Addyanund and Hunsraj, transactions which do not on the face of them appear to be in the ordinary course of business, and therefore required explanation. No such explanation has, however, been given by the witnesses or has been supplied by any document showing that those transfers were made by the authority or at the desire of the plaintiffs. The importance of proving that the last of those transfers was so made is very great, because such evidence would have gone far to show that the admitted amanutnama, that for the Rs. 3,157, which was given by the firm to Hunsraj, was really given in consequence of a direction that the existing balance of the Rs. 29,000 should be so transferred, and, not as the plaintiffs contend, as a deposit receipt for the additional sum which had been paid in.

Their Lordships, therefore, are clearly of opinion that even if they dissent from the judgment of the High Court, they are not in

Digitized by Google

a condition to affirm the judgment of the Subordinate Judge which dismissed the plaintiffs' suit.

On the other hand, their Lordships feel that in some respects the judgment of the High Court has gone too far, and contains here and there a passage which evinces some misconception of what took place in the Court below. For instance, at page 74, the learned Judge, who delivered that judgment, says, that neither Gunga Persad nor the gomashtas "say a single word about the "receipt of Rs. 3,157-8, which Bidyanund "Singh swears that he paid into the kothi. "Gunga Persad does not say that that was "not received." The record, however, shows that Gung Persad in his evidence did state that neither Hunsraj nor Bidyanund had paid him money in cash, evidently meaning thereby to deny the transaction in question. Then, again, the learned Judges, in dealing with a circumstance that can hardly have failed to strike them as it has struck their Lordships, namely, the probability that the bankers would in the ordinary course of business have given an amanutnama for the original deposit of Rs. 29,000, say that the necessity for such a document was obviated by the zurpeshgi itself, "which contains express mention of "all the particulars relative to the deposit of "the Rs. 29,000, and the duty of the defend-"ants in regard to its application." Their Lordships, however, on examining that instrument, cannot find that it contains anything of this kind. It says:—"We have taken the "same into our possession for the purpose of "paying off debts due to mahajuns." But if the document be examined, it will be found that the pronoun "we" imports the plaintiffs, not the defendants; and consequently that the whole passage expresses the receipt of the mortgage money by the mortgagors, and not the real transaction between the parties, namely, that the money should be carried to the account of the plaintiffs in the mahajuns' books.

It is further to be observed that the learned Judges appear to have been struck with the fact that, if the Subordinate Judge had acted more in accordance with the rules of evidence, and had not given an undue credit to the books, and the general statement of their correctness, he would have gone much more carefully into the trial of the issues before him, and to have thought at one time that his miscarriage in the conduct of the inquiry might be a sufficient reason for sending the case down to be re-tried. They came, however, ultimately to the conclusion that it would not be right to send the case back to re-trial, because the defendants had failed make out so good a case as they might ha done.

Their Lordships fully recognize the for of the consideration, which ultimately pr vailed with the Judges of the High Cou They admit that a re-trial ought not to directed solely to enable a party to mend l case, and that to do so in India would especially objectionable. Nevertheless, co sidering in this particular case the doubt th exists as to what really took place in t Subordinate Judge's Court, and as to wh is implied in his statement that the documer of which he speaks were identified a verified by the witnesses; considering al how much the conduct of a trial in Ind depends on the Judge, and that the defen ants may have been misled by his givi undue weight to the books, and to what w said concerning the entries in the books, a so prevented from going more fully into th case; and further, considering that in th case the question is not merely one of mon but one of character, and that the eviden on this record fails to establish satisfactor on which side the truth lies, their Lordshi are disposed, if the defendants should be advised, to send back the case for re-tria but they think that it would be unjust to so, except upon putting the defendants, w ought to have seen that their case was co ducted better, upon the terms of paying t costs of the litigation so far. If they a willing to accept those terms, then th Lordships would be prepared to recomme Her Majesty that the case should be remai ed. Their Lordships desire to observe th if it should go back, the case should be tri much more strictly both with reference to t genuineness of the signatures of the endor ments on the two amanutnamas, and w reference to particular payments. It is or necessary to instance one of the latt namely, that which is said to have been ma in satisfaction of the judgment-debt of Ra Churn Singh, as to which the case of eith side, if true, might have been far bet proved. It will be for the appellants consider whether they accept these ter or whether they are content to leave matt as they are. If they do not accept the their Lordships will have no other alternati but that of recommending Her Majesty dismiss the appeal, with costs.

The appellants, having considered t terms proposed to them by their Lordshi intimated by their Counsel that they accept

Digitized by Google

the same; and their Lordships, therefore, agreed humbly to report to Her Majesty that the case ought to be remanded to the High Court, with directions, upon payment by the appellants, within six months after the date of Her Majesty's order on this report, of the costs incurred by the respondents in the two Indian Courts except the stamp on the plaint (so far as the same remain unpaid), and also of the costs (if any), of the respondents incurred on this appeal (the amount thereof to be certified by the Registrar), to remit the said case back to the Zillah Court for re-trial; and with a declaration that in default of such payment within the said six months, the decree of the High Court do stand affirmed; and that the costs of this appeal be paid by the appellants.

The 20th March 1875.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Setting aside a Sale—Act VIII of 1859 *s.* 256—*Rights of Purchaser—Refund of Purchase-money, Outlay, &c.*

Case No. 1 of 1875.

Application for review of the judgment passed by the Hon'ble Justices J. B. Phear and G. G. Morris, on the 18*th September* 1874, *in Miscellaneous Appeal No.* 201 *of* 1874.*

E. C. Morgan, Auction Purchaser (Respondent) *Petitioner,*

versus

Moulvee Abdool Hye, Judgment-debtor (Appellant) *Opposite Party.*

The Advocate General for Petitioner.

Mr. C. Gregory, Moonshee Mahomed Yusoof, and *Baboo Judoo Nath Sahoy* for Opposite Party.

When a sale is set aside under Act VIII of 1859 s. 256, where the purchaser had, before the sale was confirmed, taken possession, laid out money, and received rents or profits, and he is turned out some time after by reason of such reversal of sale, he should get back the money laid out by him for the benefit of the estate in addition to his purchase-money and interest thereon, and should account to the judgment-debtor for the profits received by him. At the same time it would depend upon the circumstances under which the purchaser took possession, and the nature of his outlay whether he ought in equity to be allowed to claim re-imbursement of the money expended by him.

Where a purchaser *bonâ fide* took possession of the property, and from time to time laid out money thereon, because he thought that otherwise from its peculiar nature it would become even worse than valueless (*e. g.*, making advances in an indigo concern lest the opportunity of the season should pass away), it was held that he was entitled to have it made a condition of setting aside the sale that he be repaid so much of the outlay as he could show was beneficial to the estate; he accounting for the rents and profits realized by him.

Phear, J.—THE renewed and full discussion of this case, of which we have had the advantage on this review hearing, has done nothing to interfere with or disturb the grounds on which our order was made. It has been put to us on the part of the petitioner in review, that the sale, which is the subject of that order, was at best a sale pretended to be made by the Judge who had no jurisdiction to make it, and that therefore it was a nullity, and not such a transaction as could be dealt with by this Court under Sections 256 and 257 of the Civil Procedure Code. Whether defect of authority or jurisdiction in the Court to sell would necessarily deprive the Court of power to cancel the sale which it had professed to make may be questioned. We think, however, that we were right in attributing the sale to the Subordinate Judge, who was charged with the duty of executing the decree. The property was attached by him; the sale notifications were issued by him; the sale itself was ordered by him to take place and was effected on the day appointed by him through the agency of the officer, whose duty it was to carry out his orders in this respect. The irregularity which occurred was this, namely, that owing to the influence, and mistaken interference of the Judge, the Nazir who conducted the sale did not conform to the directions which the Subordinate Judge had issued to him with respect to selling the different parts of the property in successive order. We also still think that the irregularity thus committed in the way of conducting the sale, did cause substantial injury to the judgment-debtor within the meaning of Section 256 of Civil Procedure Code, for it is clear that by reason of it, more of his property was sold by the Nazir than was needed for satisfaction of the decree, and than would have been sold had the directions of the Subordinate Judge been pursued. In the case of Lutwyche *vs.* Winford (2 B. C. C., 248) where the Court of Chancery had decreed that the whole of certain property should be sold, or such part of it as might be expedient, and the master with the consent of parties sold the whole,

* *Vide* 23 W. R., p. 1.

Digitized by Google

the Court held that the *purchaser* could not refuse to complete on the ground that too much had been sold; though, had the *parties* themselves objected that their interest was affected by more being sold than was necessary, the Lord Chancellor said the Court would have been bound to take notice of it.

The facts of the case, then, appear to be such as, under Section 256, Civil Procedure Code, serve to confer upon the Court, which made the sale, a discretion to set it aside.

The immediate effect of setting aside a sale under this Section is that the immoveable property which was the subject of the sale, reverts to its former owner, and the purchaser becomes entitled to receive back his purchase-money, with or without interest in such manner as it may appear proper to the Court to direct in each instance (Section 258). And, generally, no doubt, this alone would suffice to replace the parties, vendor and purchaser, respectively in their original situations. But it may happen in any case for various reasons that the purchaser takes possession before the sale is confirmed; and having taken possession laid out money, and received rents or profits, he may, as the result of an application duly preferred by the judgment debtor, under Section 256, be turned out some months afterwards by reason of the sale being set aside in the original or in the Appellate Court. In such a case complete equilibrium of exchange would require that the purchaser himself should get back the money laid out by him for the benefit of the estate in addition to his purchase-money and interest thereon, and that he should, on the other hand, account to the judgment-debtor for the profits received by him. At the same time, of course, it would depend upon the circumstances under which the purchaser took possession and the nature of his outlay whether he ought in equity to be allowed to claim reimbursement of the money expended by him.

In the case now before us, although the judgment-debtor complained most promptly of the irregularities committed in the conduct of the sale, and on that ground sought to have the sale set aside, the purchaser took possession of the property long before the judgment-debtor's application was finally determined on appeal, and laid out very large sums of money on the property, and also received other large sums in the shape of rents and profits. Our order, however, which is now under review made no provision either in respect to the purchaser accounting, or in respect to his reimbursement. It was limited to setting aside the sale conditionally upon the purchase-money with interest being repaid to the purchaser. The judgment-debtor had not asked for an account, and we had not materials before us, upon which, we could satisfy ourselves that the purchaser had a right to be reimbursed the money or any portion of the money then vaguely said to have been spent by him on the property. We now learn from the affidavit, which has been filed in review, and we think it is beyond question, that the purchaser *bonâ fide* took possession of the property, and from time to time laid out money thereon, because he thought that otherwise, from its peculiar nature, it would become even worse than valueless. The property was, at the time when he took possession, in the hands of a Court manager appointed under Section 249, Civil Procedure Code, who delivered it to him apparently under the directions of the Court. If he or the manager had not spent money in carrying on the indigo concern very quickly after the date of the sale, the opportunity of the season would have been lost, and the property very greatly deteriorated; and if he had not paid the rents of the leasehold parts of the property when, and as they became due, the leases might have been forfeited. We think, therefore, on the whole, that the taking possession and the outlay was so far justifiable on the part of the purchaser that he is entitled to have it made a condition of setting aside the sale that he be repaid so much of the outlay as he can show was beneficial to the estate. On the other hand, he must account for the rents and profits which have come to his hands during the time he has been in possession. The Civil Procedure Code does not anywhere in express words authorize the Court when setting aside a sale under Section 256 to impose conditions such as these, but we think that if this power to set aside a sale extends to a case where the purchaser has been let into possession before the sale is confirmed (and there seems to be no doubt that it does so) then authority to this effect must be implied, otherwise the setting aside of the sale would in many cases work a greater injustice than it remedied.

We expressly stated in our original judgment in this matter that the repayment of the purchase-money with interest was to be a condition precedent to setting aside the sale. This does not seem to have been completely carried out in the decretal order

Digitized by Google

as finally drawn up. Also we are of opinion that it should be part of the condition that the purchase-money and interest should be repaid within a limited period, say within the limit of one month from the date when the necessary accounts can be taken.

Lastly, we think it is now certain that to the immoveable property which was sold, was attached the incident of the dena-paona account as it stood on the 31st October 1873, and also the liability to discharge the prior mortgage-debt of Rs. 2,750. The balance of the dena-paona account was unquestionably against the concern, and therefore these two items constituted in effect so much addition to the purchase-money. A clause must therefore be added to the decretal order declaring that all monies paid by the purchaser in discharge of the prior mortgage, and in reduction of the balance on the dena-paona account must be treated as part of the purchase-money.

We think that as the purchaser took possession of the property prematurely, and the judgment-debtor in no way assented to his doing so, he is not entitled to costs. Therefore each party must bear his own costs both of the appeal and of this hearing in review. And our order must be reformed so as to carry into effect the foregoing directions.

The 22nd March 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Suit by Minor—Plea of Minority—Onus Probandi—Joint Hindoo Family—Suit by a Member—Joint Property—Separate Profits—Father's Debts—Half Brother's Rights.

Case No. 1308 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 28th March 1874, reversing a decision of the Additional Moonsiff of that district, dated the 13th August 1873.

Cheyt Narain Singh (one of the Defendants) *Appellant,*

versus

Bunwaree Singh (Plaintiff) and another (Defendant) *Respondent.*

Baboos Kalee Kishen Sen and *Chunder Madhub Ghose* for Appellant.

Baboo Hem Chunder Banerjee for Respondent.

It is not optional with a minor to sue either in his own name or through the intervention of a guardian: he must be represented by a legally constituted guardian.

A defendant who pleads plaintiff's minority as a bar to the suit, is bound to substantiate the plea.

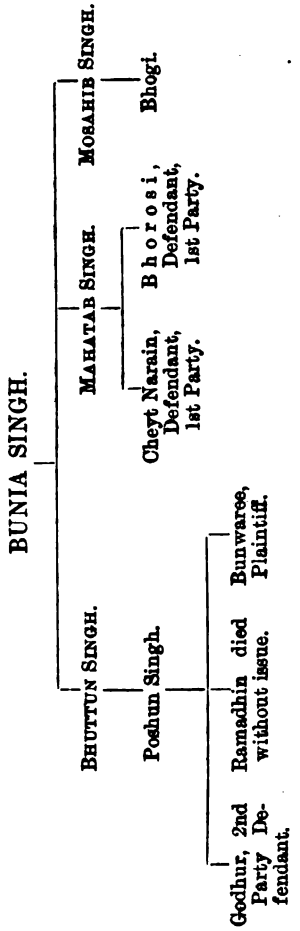
A member of a joint Hindoo family is precluded from maintaining a suit for the specific share which would devolve upon him on partition.

Separate appropriation of profits would, in some cases, be very good evidence of a tacit agreement amongst the members of a joint Hindoo family, to hold their property according to their separate shares.

A debt contracted by a father is binding upon the son, unless it is of such a nature that he can, under the provisions of the Hindoo law, repudiate it.

Where two uterine brothers and a half-brother are members of a joint Hindoo family, and one of the two former dies, the brother of the half-blood is not entitled to receive anything out of the share of the deceased.

Mitter, J.—For the clear elucidation of the facts of this case, the following genealogical tree is subjoined :—



The plaintiff Bunwaree Singh states that in the mouzah in suit his father had 1 anna

4 pie share. That, on his father's death, this share devolved upon his three sons, including himself, and the management of the joint property was in hands of the eldest brother, Godhur Singh. On the 10th April 1863, Godhur Singh executed a fictitious deed of sale in favor of Cheyt Narain Singh of the whole share belonging to all the three brothers, which he was not authorized to do. That this was a mere benamee sale, the property continued as before to remain in the possession of the three brothers.

That there was a separation sometime before 1271, after which the plaintiff and Ramadhin lived together separate from their eldest brother, Godhur Singh. Ramadhin died in the month of Joisto 1272, and his share, the plaintiff alleges, was inherited equally by himself and Godhur Singh, notwithstanding that the latter was the uterine brother of the deceased, while he was a half-brother.

That in the butwarra proceedings which took place subsequent to this, the plaintiff and his brother allowed the name of Cheyt Narain Singh to be used, they having full confidence on his honesty and good faith; but after the merbundi, Cheyt Narain Singh and his brother Bhorosi Singh, 1st party defendants, fraudulently dispossessed the plaintiff from his share in the month of Falgoon 1278. Hence this suit for possession.

The defendant Cheyt Narain Singh alleges that the sale in 1863 was a real and *bonâ fide* sale by Godhur Singh, as the managing member of a joint family, for the purpose of discharging joint family debts. He further alleges that the plaintiff and Godhur are still members of a joint family, and the said Godhur Narain Singh has brought this suit through the plaintiff who is still a minor. He further disputes the fact that the plaintiff and his deceased half-brother Ramadhin lived together separated from Godhur Singh, but states that all of them were members of a single joint family, and therefore, according to the Hindoo law, the plaintiff could not succeed to any share in the property left by Ramadhin, and that consequently the plaintiff is not entitled to one-half but to one-third of what was left by their father.

The Moonsiff framed the following issues:—

1. "Is plaintiff still a minor?"

2. "Since the kobala was executed when "plaintiff and his brothers lived in commen- "sality, can plaintiff sue for his specific "share?"

3. "Does plaintiff still live in commen- "sality with Godhur Narain Singh?"

4. "Whether the kobala was executed "benamee or not?"

5. "Is plaintiff entitled to any part of "the share of Ramadhin Singh?"

6. "Was Godhur Narain Singh legally "competent to alienate 1 anna 4 pie?"

These issues substantially raise all the questions which require determination in this case, although issue No. 2 seems to be superfluous. That issue should have been altogether omitted, and the question asked therein should have been placed at the end of issue No. 3.

As regards the plaintiff's minority, the Moonsiff disbelieved the evidence adduced by the plaintiff to prove that he has attained his majority, and from his appearance concluded that he was still a minor. But he was of opinion that the defendant could not rely upon this plea as the privilege of suing through a guardian was a privilege accorded by law to a minor for his own benefit, and, if he chose not to take advantage of it, the defendant could not object to the suit upon that ground. The Moonsiff for these reasons decided this issue in favor of the plaintiff.

With respect to all the other issues, the Moonsiff's decision was adverse to the plaintiff, and the suit was dismissed with costs.

The plaintiff preferred an appeal, and although the decree of the Appellate Court is not clear, yet we gather from a part of the judgment and the provision regarding costs, that the Subordinate Judge intended to award a modified decree in favor of the plaintiff.

Against that decree this special appeal has been preferred by the defendant Cheyt Narain Singh, and the objections raised are these:—

1. That the plaintiff being a member of a joint family is not entitled to maintain a suit for the recovery of a specific share out of the joint property.

2. That the plaintiff resting his case solely upon the ground of the purchase in 1863 being benamee, the Lower Appellate Court ought to have determined this case restricting its enquiry to that point only.

3. That the judgment of the Lower Appellate Court cannot stand, because it is based upon the supposition that the special appellant to prove the legal necessity of the

Digitized by Google

sale has adduced only two decrees, whereas there are other evidence bearing upon this matter, which the Subordinate Judge has not considered.

4. That the Lower Appellate Court is in error in holding that the debts for the satisfaction of which the property was sold were the personal debts of Poshun Singh, the plaintiff's father, because, unless the contrary be proved, such debts should be presumed to have been contracted for the joint family purposes.

5. That the plaintiff being still a minor, he cannot maintain this suit without the intervention of a guardian.

As the last objection raises a question of bar to the maintenance to the suit, it is right that we should determine it first.

The Subordinate Judge upon this issue observes that he agrees with the Moonsiff for the reasons given by the latter in overruling the defendant's objection. The reasons given by the Moonsiff do not appear to us to be correct. We do not think it is optional with a minor either to sue in his own name, or through the intervention of a guardian. If it be found that the plaintiff, though a minor, has not been represented in the suit by a legally constituted guardian, the proceedings must be stopped till a competent guardian be appointed.

But in this case it has not been made out that the plaintiff is still a minor. There is no evidence upon the record upon which such a finding could be based. We are informed that the plaintiff adduced evidence to prove that he was of age, and the defendant adduced no counter-evidence to prove that he was a minor. Both the Courts below have disbelieved the evidence adduced by the plaintiff; but still there are no materials upon which they could come to an affirmative finding that the plaintiff was still a minor. The defendant pleaded this fact as a bar to the suit, and it was for him to substantiate it. The Moonsiff seems to have based his finding upon an inspection of the plaintiff's person: but in a case like this, where the determination of the question depends upon the ascertainment of the plaintiff's exact age, mere inspection of the person alone does not afford any criterion upon which the issue may be safely determined. We are therefore of opinion that the defendant having adduced no evidence to establish the fact of plaintiff's minority, this objection must be overruled; and, although the reasons given by the Lower Courts are erroneous, the conclusion at which they have arrived is substantially correct.

With respect to the first ground urged in special appeal, it seems to us that the plaintiff, if proved to be still a member of a joint Hindoo family, would be precluded from maintaining a suit for his specific share which would devolve upon him on partition. But we have not the necessary facts found by the Lower Appellate Court to apply this principle of law. All that that Court says upon this point is this:—"There is not satisfactory evidence to show that the plaintiff and Godhur were separate." We do not think that we ought to adopt this finding, and relying upon it to dismiss the plaintiff's claim according to the principle of law stated above. The Subordinate Judge has given no reasons for his conclusion. The question, what constitutes separation under the Mitakshara law, is not a question of fact. The Subordinate Judge has not informed us in his judgment what his views are upon this point. We find that the Moonsiff has fallen into an error of law in his decision upon this issue. "From the definition of a joint Hindoo family," he observes, "it follows that not only separate appropriation, but separate holding and enjoyment in distinct and definite shares, is necessary to show that a family is not joint and undivided." The Moonsiff is clearly wrong in laying it down as a correct proposition of law. It has been held by the Lords of the Privy Council in the case of Appovier *v.* Roma Subha Aiyan and others,* that where the members of an undivided family agree among themselves to hold their joint property in certain defined shares, they cease to continue joint, and they thenceforth become separate in interests. The Moonsiff holds that separate appropriation of the profits is not sufficient to constitute separation. But separate appropriation in certain cases would be very good evidence of a tacit agreement amongst the members to hold their property according to their separate shares. We do not know whether the Subordinate Judge also shares in this erroneous view of the law. His judgment upon this point is so short and brief that we do not think that we can safely act upon it as correct.

* 8 W. R., P. C. Ruling, p. 1.

Digitized by Google

The next objection that has been urged against the judgment of the Lower Appellate Court is that, the plaintiff's suit being based only upon the allegation that the sale transaction of 1863 is fictitious, the Subordinate Judge should have decided the case solely with reference to that question. We do not think that this objection ought to prevail. Although the plaint is somewhat vague, yet we find that a distinct issue was framed by the first Court upon the question of legal necessity. The defendant was very well aware that this is one of the questions upon which the ultimate decision of the case would turn, because we find that he adduced evidence in support of his allegation relating to this issue. We, therefore, think that he cannot now in this stage of the case complain of the Courts below entering upon the adjudication of the question of legal necessity justifying the sale of 1863.

It has been contended in the next place that even if the Lower Appellate Court were justified in entering upon the question, the decision upon it cannot stand. The decision of the Subordinate Judge upon this point also seems to be very unsatisfactory. It is to the following effect:—"A couple of "decrees have been adduced to prove neces-"sity. But it has been ruled by High Court "that the mere existence of a decree is not "sufficient to make out the legal necessity. "I need hardly add that the property being "ancestral one, it could not have been sold "for satisfaction of Poshun Singh's personal "debts." Now we are informed by the pleader for the special appellant, and the fact is not disputed by the other side, that the evidence adduced by his client does not consist merely of two decrees. He has, it has been stated, examined witnesses to prove that the sale was made to pay off those decrees. The Subordinate Judge should have considered these decrees in connection with the oral evidence, and should have determined whether the whole of this evidence would make out a case of necessity. We may as well point out here that, as we propose to remand this case, the Subordinate Judge should, upon reconsideration of the whole evidence, decide the question according to the principle laid down in the well-known case of Hunooman Persbad Pandey, reported in the 6th volume of Moore's Indian Appeals. It has been also urged upon us that the Subordinate Judge has taken it for granted that these decrees were made against the father of the plaintiff on account of his personal debts. We think that the special appellant has just reason to complain in this instance also of the perfunctory mode of dealing with the questions arising in this case. He assigns no reasons which led him to consider that the decrees were passed on account of the personal debts of the father. We may observe here that, according to a recent decision of the Lords of the Privy Council, a debt contracted by the father is to be considered as binding upon the sons, unless it be established by the latter that it is of such a nature that he can, under the provisions of the Hindoo law, repudiate it. This case is reported in page 56 of the 22nd volume of the Weekly Reporter. In this view of the law, it would be for the plaintiff to prove that the debts which were the foundations of the decrees were personal debts of the father. The Subordinate Judge does not refer in his judgment to the nature of the evidence upon which his finding is based.

For these reasons we think that the judgment of the Subordinate Judge ought not to stand, and the case should be remanded to him for a fresh decision upon all these points in accordance with the directions given above.

The respondent has urged an objection under Section 348 of 1859 in respect of his share in the joint estate. It is contended that he is entitled to one-half and not one-third of the property left by his father. We think that, according to the authorities now in force, the plaintiff, if all the three brothers were members of a joint family at the time of Ramadhin's death, would not be entitled to receive anything out of the share of the deceased. But it has been stated before us that this question has been referred to be considered by a Full Bench of this Court. We need hardly add that it would be open to the Subordinate Judge to follow the decision of the Full Bench if it should in any way modify the current decisions upon this point. We think it also right to add that if, on remand, the Subordinate Judge should come to a different finding as to the status of the family at the time of Ramadhin's death, he would have to reconsider the question of law with reference to the altered nature of his finding.

Costs to follow the result.

Digitized by Google

The 22nd March 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Decree with future Effect—Code of Civil Procedure.

Case No. 2137 of 1874.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 14th May 1874, reversing a decision of the Additional Moonsiff of that district, dated the 21st May 1873.

Ram Narain Manjhee (Defendant) *Appellant,*

versus

Mussamut Futema Sogra (Plaintiff) *Respondent.*

Baboo Kalee Kishen Sen for Appellant.

Baboo Bhyrub Chunder Banerjee for Respondent.

In a suit by a landlord to recover possession where defendant, who was a tenant-at-will, had received no notice to determine his tenancy, plaintiff obtained a decree to come into operation at the beginning of the next Amlee year:

HELD that there was nothing in the Civil Procedure Code to prevent a decree of this nature being passed.

Mitter, J.—IN this case the plaintiff sued for possession of 70 beeghs 19 cottahs and 2 chittacks of land alleging that it was in the possession of the defendant as a tenant, and that the plaintiff is entitled to recover possession of it, the defendant having no title to continue in possession. She also sued to recover a certain sum of money as compensation for the damage done to a portion of the land in suit. The defendant denies his liability to pay compensation and also resists the claim for possession on various grounds which it is not necessary to notice. The Court of first instance dismissed the plaintiff's suit, holding that she was not entitled to maintain this action, because the defendant was proved to be a tenant-at-will, and as no notice had been given to him to determine his tenancy, the suit to oust him would not lie. The Lower Appellate Court has held that as no notice has been given to the defendant, the plaintiff is not entitled to a decree for immediate possession, but that she is entitled to a decree for possession, to come into operation at the beginning of the next Amlee year. The Lower Appellate Court has also awarded Rs. 30 as compensation for the damage done to the plaintiff's land.

In special appeal it is contended that a decree to this effect, namely, that it is to come into operation at the beginning of the next year cannot be passed by a Court of justice under the provisions of the Civil Procedure Code. We do not think there is any thing in the Code which prohibits a Court from passing a decree of this nature. If the facts and circumstances of the case warrant the Court in passing the decree of this nature, and if the justice of the case requires that such a decree should be made, we think there is nothing in the provisions of the Procedure Code which prevents a Court of justice from taking this course.

For these reasons, we think, that the decree passed by the Lower Appellate Court in this case is not contrary to the provisions of the Civil Procedure Code. The special appeal is dismissed with costs.

Glover, J.—I concur.

The 22nd March 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Lease of Land for Building Purposes—Ejectment.

Case No. 517 of 1874.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 15th December 1873, reversing a decision of the Moonsiff of Monghyr, dated the 14th May 1873.

Juhooree Lall Sahoo and another (Defendants) *Appellants,*

versus

Mr. H. Dear (Plaintiff) *Respondent.*

Baboo Mohinee Mohun Roy for Appellants.

Mr. R. T. Allan for Respondent.

Where land is given to a lessee for the purpose of building a house to live in, without any term being

Digitized by Google

fixed for the tenancy, the tenure of house and land cannot be taken away from the lessee's heir or his vendee so long as he continues to pay the rent assessed on it.

Glover, J.—We are inclined to think that as no evidence has been given to show what was the nature or duration of the grant made to the pensioner Serjeant Webb, it may fairly under the circumstances be presumed to have been a lease of the land for building purposes. That it was given for life only is mere assertion, and that assertion is moreover contradicted by the fact, that, after the Serjeant's death, his widow lived in the house, and after her, a daughter. It is not denied that the land was given to Serjeant Webb for the purpose of building a house to live in, and there is no evidence, that when it was given, and the house built, any term was fixed for the tenancy.

And if that were so, we do not think that the circumstance of a subsequent purchaser's taking a fresh lease from Government, which was to expire in 1872, would invalidate a right already acquired to hold the land, so long as rent was paid for it.

The Judge seems to have been considerably influenced in his decision, by the fact that when the defendant Phikoo purchased from the daughter of Serjeant Webb, the deed of sale only conveyed the house without making any mention of the land, but the fact is not so. We have had the kobalah read, and it purports to convey, not only the building, but the land before and behind it (it is in evidence that the abode is surrounded by a wall), and as the whole extent of the land granted to Serjeant Webb was only three biswahs, this description would fairly include the whole of the grant. It is said that the defendant is now in possession of five biswahs of land, there is no evidence that he took possession of anything more than was in the possession of Miss Howard, Serjeant Webb's daughter, and as the property is surrounded by a wall, it is presumable that he has only got what was originally granted.

We think that it was for the plaintiff to prove that the grant to Serjeant Webb was of a temporary nature, and that this not having been proved, the tenure must be held as having been one granted for the usual building purposes, and cannot be taken away from the vendee of the original owner's heir so long as he continues to pay the rent assessed on it.

We would reverse the Judge's order and restore that of the Moonsiff with costs.

The 22nd March 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Dispossession—Cause of Action—Misjoinder.

Cases Nos. 1781 and 1782 of 1874.

Special Appeals from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 8th June 1874, *affirming a decree of the Assistant Commissioner of Palamow in Lohardugga, dated the* 10*th November* 1873.

Mussamut Ackjoo Bibee and another (Plaintiffs) *Appellants,*

versus

Lallah Ramchunder Lall Sahai and others (Defendants) *Respondents.*

Moonshee Mahomed Yusoof for Appellants.

Baboo Taruck Nath Sen for Respondents.

In a suit to recover possession on the ground of dispossession by all the defendants in consequence of certain Act X decisions, HELD that there was but one cause of action, and that the fact, that the defendants each claimed to hold portions of the property under different titles could not make the suit bad for misjoinder.

Glover, J.—It appears to me that the Judicial Commissioner was wrong in throwing out these suits on the ground of misjoinder. The Full Bench Decision of the 7th June 1867—Rajah Ram Tewaree *v.* Luchmun Pershad—laid it down that Courts should reject plaints against several defendants for causes of action which have accrued against them separately, and in respect of which they are not jointly concerned, and that decision was no doubt correct, but in this case the causes of action as stated in the plaint did not accrue separately. There was but one cause of action alleged, and that was dispossession by all the defendants in consequence of the Act X decisions of April and May 1870. If the plaintiff succeeded in proving this, his cause of action was one and the same against all the defendants, and there was no misjoinder.

The Judicial Commissioner seems to have looked to the defences set up, and not to the plaintiff's case as described in the plaint. A plaintiff alleging a single act of dispossession against a number of defendants could not, or at all events need not, know the nature of the defence which will be set up to his

Digitized by Google

recovery of possession until the written statements are put in, and the fact that the defendants each claim to hold portions of the property under different titles cannot make his suit bad for misjoinder.

Something is made in this case of the fact that the plaintiff's vakeel admitted verbally that his client was wrong in suing the defendants jointly, but a mistaken petition on the part of the pleader would be no ground for the Courts passing an illegal order.

I think that the plaintiff was entitled to have his case enquired into. Of course, if it be found that the defendant did not dispossess him as stated, he will be liable to have his suit dismissed.

Both suits must be remanded, and costs will abide the result.

The 22nd March 1875.

Present :

The Hon'ble W. F. McDonell, *Judge.*

User—Act IX of 1871 *s.* 27.

Case No. 1592 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Moorshedabad, dated the 16*th May* 1874, *affirming a decision of the Sudder Moonsiff of that district, dated the* 12*th June* 1873.

Gopee Chand Setia (Defendant) *Appellant,*

versus

Bhoobun Mohun Sen (Plaintiff) *Respondent.*

Baboo Roop Nath Banerjee for Appellant.

Baboo Kalee Kishen Sen for Respondent.

In a suit to establish a right of way, it is not sufficient for a plaintiff to prove user for twenty years, which ended more than two years next before the institution of the suit; he must show exercise of the right by actual user within such period of two years.

THIS was a suit for the opening of a way and a water-course which the defendant obstructed by the raising of a wall on the ground that it had been existing from time immemorial. The defendant denied the existence of the right of way or the water-course. Both the Courts have found that under the provisions of Section 27 Act IX of 1871, the plaintiff has proved his peaceful and uninterrupted enjoyment for twenty years.

In special appeal it is urged that the Lower Appellate Court should have dismissed the claim set up by plaintiff inasmuch as he failed to establish the exercise of his right by actual user within two years next before the institution of the suit, and that the Subordinate Judge has erred in holding that the plaintiff's discontinuance to use the way for four years prior to the suit is not sufficient to defeat his claim. Now, if the Lower Appellate Court had found as a fact, that the plaintiff had not used the way for four years, there is no doubt that the grounds of special appeal would have held good, but from a perusal of the judgment, it is not so clear that the Subordinate Judge has found this to be the fact, he has apparently merely stated this as an illustration of his reading of the law, for he says :—"The evidence of plaintiff Bhoobun and that "of Somer Chand Bothra, a disinterested "witness of position and wealth, called by "both the contending parties, taken together "with the evidence given by plaintiff's wit-"nesses before remand, prove that the plain-"tiff has been in open and peaceable enjoy-"ment of the way and the water-course for "twenty years immediately before the suit. "That this enjoyment was as an easement "and as of right will be evident from the "fact that there was no other way for the "passage of men and water from plaintiff's "house, and that the plaintiff enjoyed the "way and the water-course adversely to all "and not with the permission of any one." The Subordinate Judge then goes on to say :—"True it is that there is no distinct evidence "of that use subsequent to 1274, but when "there was no discontinuance of the right of "user from 1274 before the date of the obstruc-"tion in 1278, the fact of the plaintiff not "having used the way, say for four years or "so, could not by any manner of means be "construed to be an interruption within the "meaning of Section 27 Act IX of 1871." He further remarks :—"I do not think that "the plaintiff is required by law to prove "by direct evidence enjoyment for twenty "years. It is enough if it is proved by "prescriptive evidence even." Now, here the Subordinate Judge seems to forget that Section 27 distinctly lays down that "each of the said periods of twenty "years shall be taken to be a period ending "within two years next before the institution "of the suit wherein the claim to which "such period relates is contested." And Illustration (*b*) shows, that where a plaintiff merely proves that he enjoyed the right for a

Digitized by Google

period of twenty years, which ended more than two years next before the institution of the suit, his suit shall be dismissed, as no exercise of the right by actual user has been proved to have taken place within two years next before the institution of the suit. Reading the whole of the judgment of the Lower Appellate Court, it is certainly doubtful whether it finds that there has been an user by the plaintiff within two years of the institution of the suit, and the case therefore must be remanded to the Lower Appellate Court under Section 354 for a distinct finding on this point. The finding to be returned to this Court.

The 23rd March 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

High Court's Act s. 15.

In the matter of

Khowaz Ram Bux Singh, *Petitioner,*

versus

Bishendharee Geer, *Opposite Party.*

Mr. R. T. Allan and *Baboo Jogesh Chunder Dey* for Petitioner.

No one for Opposite Party.

The High Court will not exercise its extraordinary powers under the Charter Act, s. 15, except where jurisdiction has been either exercised or refused improperly: it will not interfere under that Section even where a wrong decision has been arrived at, if the Court which arrived at such decision exercised a jurisdiction which it properly possessed.

Glover, J.—We are asked to interfere in this case under Section 15 of the High Court's Act, and to declare the execution sale void by reason of there having been no previous attachment under Section 235 of the Procedure Code. The Judicial Commissioner considered that, although an attachment was directed by the Code to be made previous to a sale, which attachment owing to a mistake of the Deputy Commissioner as to its necessity was not made in the present instance, still as no injury had resulted to the judgment-debtor from the omission, the sale ought not to be set aside.

We do not see how we can interfere under Section 15. Granting that the Judicial Commissioner was wrong in his view of the law, and that an attachment was a necessary preliminary to a sale, that would not make out a case of either exercising or refusing jurisdiction improperly. This Court has generally refused to exercise its extraordinary powers when the sole ground put forward by a petitioner has been that the Judge below had passed an illegal order.*

* XII W. R., 23, Doorga Churn Sircar *v.* Doorga Churn Ghosal.

Now in this case the Judicial Commissioner as the Court of appeal had jurisdiction to decide whether the sale at auction was or was not vitiated by reason of a certain irregularity in the proceedings, and he decided that, although the irregularity had occurred, it did not vitiate the sale, because no injury had been done to the judgment-debtor thereby. This might have been a wrong decision, but the Judicial Commissioner in passing it exercised a jurisdiction which was undoubtedly in him. An order which, if right, would be admittedly passed with jurisdiction, cannot be said to be made without jurisdiction, when wrong.

It may be that in the present case the judgment-debtor suffered no substantial injury, and that the low price at which the property sold was caused not by the omission to attach, but by the number of claims that were to be made against it, still there ought by law to have been an attachment previous to sale, and the Judicial Commissioner ought, we think, to have ordered a re-sale on this ground.

But we have no power to interfere under Section 15, and this petition must, we think, be rejected.

Digitized by Google

The 24th March 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Stamp Duty—Agreements—Act XVIII of 1869, *Sch. II, Art.* 11.

Reference to the High Court by the Judge of the Small Cause Court at Midnapore, dated the 5th February 1875.

Mrs. A. Ferrier, *Plaintiff,*

versus

Ram Kalpa Ghose, *Defendant.*

An instrument which acknowledged receipt of a sum of money and provided for the payment of interest at a specified rate *per mensem*, was held to be an agreement falling within Act XVIII of 1869, Sch. II, Art. 11.

Case.—PLAINTIFF sued the defendant for Rs. 70, principal and interest, due on a note, dated 4th August 1873, which is unstamped, —the plaintiff calling it in her plaint a tomsook.

The defendant denies the note, and among other pleas contends, that the note is a promissory note, and is not admissible in evidence for want of stamp.

Plaintiff's pleaders offer *ad valorem* duty and the usual penalty. There cannot be any doubt from the evidence, that the omission to stamp the instrument, or to execute it on stamped paper, did not arise out of any intention to evade payment of stamp duty; it simply arose from the fact that stamp was not available at the place where it was executed, and which is in the interior of this district, at the time when money was lent. Now, if the note be a promissory note, no penalty or duty can be taken in order to make it admissible in evidence under Section 28 Act XVIII of 1869, and I do not think the provisions of Section 26 can in any way apply to plaintiff's case because the plaintiff is not a banker, or a person acting as banker. The note which is herewith submitted runs thus :—

"Received from Memshab the sum of "Company's forty rupees, and I give inter- "est for one month, two rupees."

(Sd.) RAM KALPA GHOSE.

The instrument is no doubt very badly worded, but considering the nature of the document, and the plaintiff's evidence whereby the intentions of the parties may be inferred, I think the document is nothing more than a promissory note. It may be construed thus :—"Received from Mem- "shaheb the sum of Rs. 40, which I promise "to pay with interest at the rate of two "rupees per month." There is indeed no time of payment fixed in the document, but when no time is specified, a note may be payable on demand. Plaintiff in her evidence says, that money was to be repaid after one month, if so still it is not the less a promissory note. She further says that, "I take this note to be a promissory note, "or an acknowledgment." She may have doubts as to what name to give to this note, but I think the document is nothing more than a promissory note. The plaintiff's pleaders contended that the instrument is an acknowledgment of money received, and is to be stamped like an ordinary bond; but I cannot accept this argument. The document partakes more of the nature of a promissory note than that of a bond. No particular form of words is necessary to constitute a promissory note, and it cannot be denied that there was a promise of payment of money in this case absolutely and unconditionally though the word "promise" is not expressly mentioned in the document itself. The instrument, I think, falls under the definition No. 25, and not under 5 Section 3 Act XVIII of 1869.

At the earnest solicitation of the plaintiff's pleaders, and considering that doubts may be entertained from the wording of the instrument, and also bearing in mind the fact, that instruments like the one under consideration may occasionally come before the Court which will have to decide questions of stamp law, I beg most respectfully to refer the following points for an authoritative decision of the Hon'ble Judges of the High Court, *viz.*—

1. Whether I am right or not in construing the document to be a promissory note?

2. If not, whether any and what stamp duty ought to be taken for it?

Contingent upon the opinion of the Hon'ble Court, I dismiss the case with costs.

The judgments of the High Court were delivered as follows by—

Mitter, J.—I do not think that the instrument upon which this suit has been brought is a promissory note, within the definition given in Clause 25 of Section 3 of the General Stamp Act, 1869. It is to the following effect:—"'Promissory note' includes "every instrument whereby the maker "engages absolutely to pay a specified sum "of money to another at a time therein "limited, or on demand, or of sight." The

Digitized by Google

document set out in the letter of reference is not an instrument *whereby* the maker engages absolutely to pay any money. If any such engagement exist in this case, it is not by this document, which is entirely silent upon the matter. For example, if in this case the plaintiff simply proves the execution of this document, she would not be entitled to recover a decree for money unless it be established by some other evidence that there was such engagement on the part of the defendant. The Clause in question also provides that the time within which the repayment is to be made must be mentioned in the document itself. The words "at a time *therein* limited," clearly indicate this construction, and whether it is payable on demand or at sight must also appear on the face of the document itself. There is no time limited in the document under consideration, nor does it say that the payment is to be made on demand or at sight.

The same reasons for which I hold that this document is not a promissory note will preclude it from being considered as a bond as defined in Clause 5 of the same Section. It is not also a "receipt" within the meaning of Article 7 of the Schedule II of the Act, for it is not given upon the payment of money in satisfaction of a debt. It is only an acknowledgment of the receipt of a sum of money *whereby* no obligation is imposed in the acknowledgment. If there be any obligation on the part of the defendant in this case to repay the money, the receipt of which is acknowledged by this document, that obligation must be established by other evidence But the document further provides for payment of interest at the rate of Rs. 2 for one month. Therefore it may be considered as an agreement, and as there is no provision in the Act expressly applicable to an instrument like this, it must fall within Article 11 of Schedule II, *viz.*, an agreement or memorandum of an agreement not otherwise provided for by this Act. For these reasons, I think the Judge of Small Cause Court of Midnapore is not right in holding that it is a promissory note, but I am of opinion that it is an agreement mentioned in Article 11 of Schedule II and should have been stamped accordingly.

Glover, J.—I also am of opinion that the document on which the plaintiff sued is not a promissory note in the terms of Clause 25, Section 3 of the General Stamp Act. With regard to the payment of interest, I think that the arrangement was that it was to be paid month after month until the principal was liquidated; the words one month are evidently a mistake for every month, the document is written in very bad English, probably by the Memshaheb, who lent the money, but the meaning is I think clear.

I agree with my learned colleague in holding the document to be of the nature of an agreement specified in Article 11, Schedule II, and one that ought to have been stamped.

The 24th March 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Appellate Court—New Case—Execution Sale for Arrears of Rent.

Case No. 2076 of 1874.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 24th July 1874, *reversing a decision of the Moonsiff of Bishenpore, dated the 23rd August* 1873.

Raja Ram Banerjee (Plaintiff) *Appellant,*

versus

Sonatun Roy (Defendant) *Respondent.*

Baboo Chunder Madhub Ghose for Appellant.

Baboo Kishoree Mohun Roy for Respondent.

Certain land, belonging to one K, having been sold in execution of a decree against J, his widow and heiress, the auction-purchaser, in attempting to take possession was resisted by S, the brother of the deceased. He accordingly sued S for possession. The defendant pleaded that he had purchased the land under a kobala from K, and that neither J, nor his widow, had been in possession within twelve years. Both pleas were overruled by the first Court. who decreed the suit. The Judge in appeal sent for the execution record and, finding that the decree was for rent and against the widow, decided that the sale passed her interest only and not her deceased husband's property; and he dismissed the suit:

HELD, that the Lower Appellate Court was not right in making a new case for the defendant.

HELD that if the decree, in execution of which the land was sold, was for arrears of rent due on this particular jote, it was not a personal decree against the widow, but would affect the tenure itself.

Glover, J.—THIS was a suit for possession of land, said to be the property of one Kuraram, deceased, which was sold in execution

Digitized by Google

of a decree for rent against his widow and heiress. The plaintiff was the auction-purchaser; but, when he went to take possession, was resisted by the defendant Sonatun Roy, brother of the deceased Kuraram.

The defendant alleged purchase under a kobalah from Kuraram in 1258 B.S.

Both the Lower Courts held that the plaintiff was not barred by limitation, and that the defendant had failed to prove his purchase. The Judge, however, after deciding these points, sent for the execution record, and finding from it that the decree was for rent of the years 1273-1274, and was against Joy Monee, Kuraram's widow (the husband having died in 1272), held that the sale passed Joy Monee's interests only, and did not bind Kuraram's property. He accordingly reversed the Moonsiff's decree, and dismissed the plaintiff's suit.

In special appeal, it is contended that the Judge was not justified in deciding the case in this manner, no issue on the point having been raised or determined by the Moonsiff.

This objection is, I think, a good one. There was no contention on the part of the defendant, that what the plaintiff purchased at auction, as the right and interest of Joy Monee, was not her right in the land heretofore of Kuraram. His defence was that he had bought that land before the auction-sale. And the Judge was not right in making a new case for the defendant; but in any case he ought to have remanded the suit to the Moonsiff, with directions to try the issue whether or not the sale of Joy Monee's rights was in fact the sale of the rights of Kuraram's heiress in the disputed property, and whether they gave the purchaser a title to take possession of what had been Kuraram's land. The rent for which Joy Monee was sued, is stated by the defendant's vakeel not to be the rent due on the land now disputed; and this was a most important point to decide as, if it were found that the sale was held for arrears due on this particular jote, the decree would affect the tenure itself notwithstanding that the rent was for a period subsequent to Kuraram's death, and that the judgment-debtor was Joy Monee. On the other hand, if Joy Monee's personal right only was sold, that right was probably a life-interest only; and as she has since died, this would be a very important element in the consideration of the plaintiff's case.

I think that, considering the way in which the Judge has disposed of the matter, it would not be satisfactory to throw out the appeal, or to decree the plaintiff's suit, without further enquiry, and I think that the Moonsiff should fix and determine an issue as to what was the nature of Joy Monee's right which was sold at auction, before it can be decided whether the plaintiff is entitled to succeed in this suit. The defendant's kobalah may be false; but that would not authorize the plaintiff as purchaser of Joy Monee's rights to take possession of a jote belonging to Kuraram. So far as it appears on the record, the decree for rent against Joy Monee was a personal one, and had nothing to do with the land held by her husband.

Costs to follow the result.

Mitter, J.—The plaintiff alleges that the land in suit belonged to one Kuraram Roy, and was sold in execution of a decree against Joya Bhuttani, widow and heiress of Kuraram, and purchased by the plaintiff; that, on his attempting to take possession of it, he was opposed by the defendant Sonatun Roy, brother of the deceased Kuraram: and hence he brings this suit to recover possession of it.

The defendant stated that neither Kuraram nor his widow had been in possession of it within twelve years, Kuraram having sold it during his lifetime to him on the 5th of Assin 1258.

Upon these allegations two issues were framed by the Moonsiff, *viz.*: (1) "Is the suit barred by limitation?" and (2) "Is defendant's kobalah proved, and is he in possession accordingly?"

The Moonsiff decided both these issues against the defendant, and decreed the claim. The District Judge, on appeal, agreed with the Moonsiff in holding that both these issues should be decided against the defendant; but he allowed the appellant to raise for the first time in appeal a new objection to the effect, *viz.*, the plaintiff having purchased the life-interest of the widow, who died before the auction-sale, acquired nothing by his purchase, and therefore must fail in this suit. The Judge sent for the records of the decree in execution of which the plaintiff purchased, and found that the decree in question was passed against the widow for arrears of rent accrued due after the death of Kuraram, and therefore held that it was a personal decree against her. He, accordingly, dismissed the suit on the ground that the plaintiff acquired no title, as the auction-sale took place after the death of the widow.

Digitized by Google

It is clear that this judgment cannot stand. The Lower Appellate Court has decided this suit allowing the defendant to make an entirely new case in the Appellate Court, and that also without raising a fresh issue, and allowing the plaintiff any opportunity of meeting it. On this ground the judgment of the Lower Appellate Court must be reversed.

It now remains to consider whether we should remand the case to the Lower Court to raise a new issue upon this question, and allow the parties to adduce fresh evidence. I am of opinion that we ought not to remand the case for that purpose. It is evident that this is entirely an after-thought which occurred to the advisers of the defendant in the Appellate Court after he had been defeated on the grounds upon which he rested his defence. We ought not to allow parties to raise new questions, which require fresh enquiry into facts in the Appellate Court, as a matter of course. There must be some especial ground made out entitling a party to ask for this unusual course to be taken, no such special ground has been assigned or made out.

Then again the decree in execution of which the land in suit was sold was a decree for arrears of rent; and it has been held in a case reported in page 501, 12th Weekly Reporter, that such a decree is not a personal decree against the widow. It has been stated before us by the pleader for the defendant that the rent for which the widow was sued was not on account of the land now in dispute. Whether this would make any difference is doubtful; but this again is a statement for the first time made before us in special appeal by the pleader for the respondent. Moreover, looking at the sale certificate, the contention of the respondent seems to me not very probable. According to that document the sale took place after the death of the widow, and the execution proceedings were taken against the daughters of Kurram. It describes the property sold as that of the deceased debtor, and, upon the face of it, it is very doubtful whether by the words "deceased debtor" the widow or Kurram was meant. Certainly, it is not at all reasonable to hold that a Court of justice was putting up to sale a *life-interest* after the *death* of the life-tenant. For these reasons, I am of opinion that the case ought not to be remanded. I would, therefore, decree this special appeal, reversing the judgment of the Lower Appellate Court with costs.

The 25th March 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Special Appeal.

Case No. 1874 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Moorshedabad, dated the 16th May 1874, modifying a decision of the Moonsiff of Jungypore, dated the 27th October 1873.

Bungshee Dhur Mahata (Defendant) *Appellant,*

versus

Mudhoo Soodun Chowdhry and another (Plaintiffs) *Respondents.*

Baboos Mohinee Mohun Roy and *Sreenath Doss* for Appellant.

Baboo Gooroo Doss Banerjee for Respondents.

Where the conclusion of the Lower Appellate Court rested, not only upon the contents of a document involving the question of its correct construction, but also upon all the facts of the case and the whole conduct of the parties, HELD that it was not open to special appeal.

Jackson, J.—IT appears to us that the special appeal in this case cannot be sustained. The ground of appeal relied upon is that the Court below ought, on a true construction of the putnee lease and the plaintiff's sale certificate, to have held that the plaintiffs are only entitled to a rateable proportion of the annual malikana profits calculated upon the share of the nine villages purchased by them, and it is contended that this is a ground of appeal which the Court ought to entertain in special appeal, because it is a question of law, being a question of the construction of the terms of the instrument on which the parties rely. It appears to us that the view taken of this case by the Lower Appellate Court is not based merely upon the construction of any particular instrument. As to the terms of the document in question, and the meaning and legal signification of those terms, so long as it is in force, there is really no question. That on which the Subordinate Judge, in the Court below, came to a conclusion is what the parties to that instrument intended as to the duration of the arrangement therein entered into,—that is to say, whether it was to be an

Digitized by Google

arrangement continuing for all time, and final and conclusive upon the parties holding under Banee Madhub, or whether it was one which was to subsist only so long as Banee Madhub and the defendant held the same relative positions as they were then holding. That is a matter of inference not only upon the contents of the document, but also upon the whole facts and the conduct of the parties. It appears to us, therefore, that it is not such a question as we are entitled to look into in special appeal. As far as we have considered the case, we think we may say that it appears to us that the conclusion of the Subordinate Judge is a reasonable and equitable conclusion, and other considerations besides those which he stated might be adduced in support of that opinion. But we would rest our judgment upon the ground that the question is really and substantially one of fact and not of law, and that the finding of the Lower Appellate Court is one which cannot be questioned in special appeal. The appeal must be dismissed with costs.

The 25th March 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Decree—Execution.

Case No. 1634 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 5th May 1874, *modifying a decision of the Additional Moonsiff of Manickgunge, dated the 28th July* 1873.

Sreemutty Nubo Doorga (Plaintiff) *Appellant,*

versus

Sreemutty Seeta Monee and others (some of the Defendants) *Respondents.*

Baboo Huree Mohun Chuckerbutty for Appellant.

Baboos Mohinee Mohun Roy and *Nullit Chunder Sen* for Respondents.

When a plaintiff obtains a decree for possession o immoveable property, it lies upon him to take steps to obtain actual possession, and to assert that possession by taking rents or the like; and if he omits to do so, and suffers twelve years to elapse without any actual possession, he loses the benefit of his previous decree, and is not entitled to maintain a suit.

Jackson, J.—In this case the plaintiff has had her suit dismissed *in toto*, by the Subordinate Judge, on the ground of limitation; the Subordinate Judge, in fact, holding that the plaintiff has entirely failed to make out any sort of possession over the property in dispute within twelve years before the beginning of the suit. The plaintiff's contention in special appeal before us is that she had previously recovered within twelve years a decree for possession of this very land against the principal defendants in this suit, and that she had possession given to her under Section 224 of the Civil Procedure Code. Now the Court below having found that the plaintiff's possession had not been made out, it results that the plaintiff relies merely upon the delivery made by order of the Court in the manner prescribed by Section 224; and Baboo Huree Mohun Chuckerbutty contends that such order for possession is sufficient to support the suit. We have asked him for authority in support of this proposition, but he has been able to cite none. It appears to us that when a plaintiff obtains a decree for possession of immoveable property, it lies upon him to take steps to obtain actual possession, and to assert that possession by taking rents or the like; and if he omits to do so and suffers twelve years to elapse without ever having had any actual possession of the land, he loses the benefit of his previous decree, and is not entitled to maintain a suit. In this case dispossession on the part of the defendant was set up and relied upon. That of course implies the possession of the plaintiff, and if such possession is negatived by the finding of the Court below, it appears to us we have no choice but to dismiss the suit. The appeal will be dismissed with costs.

Digitized by Google

The 25th March 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Act VIII (B.C.) of 1869 *s.* 302—*Intervenor—Special Appeal.*

Case No. 1691 of 1874.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 14th April 1874, *affirming a decision of the Additional Moonsiff of Serampore, dated the 29th January* 1874.

Raj Kishen Mookerjee (one of the Defendants) *Appellant,*

versus

Sreenath Dutt (Plaintiff) *Respondent.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Ashootosh Mookerjee for Respondent.

The circumstance that a question has been determined at the hearing of the appeal in a rent suit, by which an intervenor may be injuriously affected, will not make the appeal cognizable as a special appeal, unless the decision has involved some title or interest, in land, of parties having conflicting claims thereto.

Jackson, J.—In our opinion the objection taken under Section 102 of Act VIII (B.C.) of 1869 to the hearing of this appeal must prevail. The circumstance that a question has been determined at the hearing of the appeal in the District Court, by which a party, who has intervened in a rent suit, may be injuriously affected, will not make the appeal cognizable as a special appeal unless the decision has had the effect of determining some question of title or interest in land as between parties having conflicting claims thereto. Now it is clear that in this case no question relating to title or interest in land as between parties having conflicting claims has been determined by the judgment, because there was no title or interest in land claimed by the special appellant and the special respondent in conflict with each other. That which the special appellant had asserted, and which the Courts below refused to recognize, was his right to interpose himself between the zemindar and the tenant in occupation of the land. We should have said that, constituted as this suit was, the special appellant was not entitled to have himself placed on the record as a defendant: and, if we had been hearing the case as a regular appeal, we should be inclined to order that the record should be amended by striking out his name; but the necessary object will, we think, be effected by our rejecting this appeal with costs.

The 25th March 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Issues—Splitting of Causes—Jurisdiction.

Case No. 1635 of 1874.

Special Appeal from a decision passed by the 2nd Subordinate Judge of Moorshedabad, dated the 23rd April 1874, *reversing a decision of the Moonsiff of Jungypore, dated the 17th September* 1873.

Rukmini Burmonia (Plaintiff) *Appellant,*

versus

Foodun Koomaree Burmonia and others (Defendants) *Respondents.*

Baboos Mohinee Mohun Roy and *Gooroo Doss Banerjee* for Appellant.

Baboos Unnoda Pershad Banerjee and *Motee Lall Mookerjee* for Respondents.

Two suits, brought by different sharers of one property against the same defendant, having been tried by the Moonsiff, without any objection from the defendant on the score of jurisdiction, the Subordinate Judge raised the issue whether the suits were brought separately in order to bring them within the Moonsiff's jurisdiction, and concluding that this was the object, reversed the decision of the first Court:

Held that the Lower Appellate Court ought not to have raised the issue on its own motion, but to have heard the appeals on the merits.

Jackson, J.—We think the decision of the Lower Appellate Court in this case must be set aside. The decision refers to two suits filed at the same time by different plaintiffs against the same defendant, the plaintiff in one suit being the owner of 10 annas share, and the other plaintiff being the owner of 6 annas share, of the same property, and each plaintiff added the plaintiff in the other suit as a *pro formâ* defendant in his own case. These two suits went to trial before the Moonsiff, and after a very careful

Digitized by Google

judgment, in which the facts were gone into at, we may say, unusual length, judgment was given in favour of the plaintiff as to part of the claim. Both the parties appealed. The Subordinate Judge, of his own motion, thereupon raised the following issue:—"Whether the above two suits were instituted in separate numbers, just for the purpose of changing the jurisdiction of the Court or not?" and as he finds that, adding the values of the two suits together, the amount comes to Rs. 1,077 being Rs. 77 above the pecuniary limit of the jurisdiction of the Moonsiff's Court, he comes to the conclusion that the suits had been so brought with the object of bringing the suit within the Moonsiff's jurisdiction, and as they would not have been cognizable if one united suit had been brought, he reversed the judgment of the Court below. Now, so far from the defendant taking exception to the course taken in this suit by the plaintiff, we find it set out in page 4 of the printed paper book, that "defendants object that there has been a misjoinder of different causes of action against different parties." So that far from saying that the two suits ought to have been consolidated, the defendants, on the contrary, said that there ought to have been many more suits. It appears to us on the face of the plaint that the Moonsiff had jurisdiction to entertain the suit; and as he had gone to try the suit on the merits, and apparently did so with great care, we think the Subordinate Judge was not called upon to raise, and ought not to have raised, the issue that he did of his own motion; but ought to have heard the appeals on the merits. The Subordinate Judge refers, in support of his judgment, to a case* at page 42 of the Appendix to 7 B. L. Reports; but the circumstances of that case were very different. There five suits, which might apparently have been and ought to have been brought as one suit, were filed against the same defendant. The defendant immediately took objection. Thereupon the Court below refused to proceed in the suits, and a special appeal was made against the refusal. The Court here affirmed the order refusing to entertain the suits; but reversed the order dismissing the suit before the merits of the case had been gone into. The decision of the Subordinate Judge, therefore, must be set aside, and the appeal must be heard on the merits. This order will govern No. 1636.

* 1 W. R., Civ. Rul., p. 69.

[PRIVY COUNCIL JUDGMENT.]

The 11th March 1875.

Present:

Sir James W. Colvile, Sir Barnes Peacock, and Sir Montague E. Smith.

Hindoo Law—Inheritance—Cognates (Bundhoos), Sapindas, &c.—Appointment of a Daughter to raise a Son.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Thakoor Jeebnath Singh

versus

The Court of Wards and others.

A bundhoo or cognate only cannot inherit as long as there is a sapinda or samanodaka in existence.

Quære.—Is the old rule of Hindoo law obsolete, or does it still exist that a daughter may be specially appointed to raise a son, and the son of a daughter so appointed is entitled to succeed in preference to more distant male relatives?

THIS was a suit brought by Thakoor Jeebnath Singh against Baboo Brumnarain Singh, represented by the Court of Wards, and the Maharanee Heeranath Koowuree, to recover the possession of the raj of Ramgurh, which is an impartible raj. The principal question raised in the suit turned upon the Hindoo law of inheritance, and was whether the plaintiff Jeebnath Singh, or Baboo Brumnarain Singh, was entitled to succeed the Rajah Trilokenath, who was the last proprietor of the raj. Rajah Trilokenath died childless, and, indeed, a minor. The appellant Jeebnath Singh claims as father's sister's son, and no doubt he is a nearer relative, in one sense, to the deceased Rajah than the respondent Brumnarain Singh; going back to the common ancestor, Brumnarain is the great-grandson of that common ancestor.

It was admitted by Mr. Leith in argument that the case which was lately decided by this tribunal, of Bhyah Ram Singh *v.* Bhyah Ugur Singh, in the 13th Moore, page 371,† was an authority decisively against the appellant's claim. It is immaterial to consider whether Brumnarain was a sapinda or samanodaka, because he was clearly in one of those two classes, and whether in one or the other he was in the line of male descendants from the common ancestor, and the decision referred to is that

* From the judgment of Couch, CJ., and L. S. Jackson and Glover, JJ., dated 12th July 1870.—14 W. R., 117.

† 14 W. R., P. C., 1.

Digitized by Google

this line must be exhausted, before bundhoos are resorted to, in order to discover the heir of the last proprietor. Jeebnath Singh is a bundhoo or cognate only, and therefore he cannot take as long as there is either a sapinda or a samanodaka in existence. The case, therefore, to which Mr. Leith referred, in the 13th Moore, has really decided the appeal, so far as that question is concerned, against the appellant, and that case in principle followed two previous cases, one in the 2nd Moore, page 132,* and the other in the 4th Moore, page 292.†

The other point which Mr. Leith raised was this:—That assuming the appellant, Jeebnath was not the nearest heir according to the ordinary rules of succession, he was made an heir by the act of Maharajah Sidnath Singh, who, he says, appointed a daughter, Jeebnath's mother, to raise a son to him; and he contends that by a rule of Hindoo law, a son of a daughter so appointed is entitled to succeed in preference to more distant male relatives; that a rule of law of this nature is to be found amongst old collections of Hindoo law appears to be established by the text to which Mr. Leith referred, but there seems to be an opinion amongst the text-writers that that rule has become obsolete. In Sir Thomas Strange's book, under the head of "Inheritance," he thus speaks of it:—"Daughters.—The right "of daughters to succeed in default of sons "and widow, is not to be confounded with "that of the appointed daughter under the "old law; that appointment was one of "the many substitutions for the son, and by "fiction no longer subsisting regarded as "one." Then he says, referring to another "custom:—"This is analogous to the law "as applicable to the appointed daughter, "but that substitution, with others of a more "questionable kind, became obsolete." In Sir William Macnaghten's Treatise on Hindoo Law, in the Chapter on "Adoption," he says:—"In former times it was the practice "to affiliate daughters in default of male "issue, but the practice is now forbidden. "The other forms of adoption enumerated "by Menu appear to be wholly obsolete in "the present age." This appointment of a daughter may not be strictly an adoption, but the text-writers evidently refer to this custom, amongst others, as being obsolete. It is not necessary in this case to decide that this is so, although there certainly does not appear to have arisen in modern times any instance in the Courts where this custom has been considered. But supposing it to exist, inasmuch as it breaks in upon the general rules of succession, whenever an heir claims to succeed by virtue of that rule, he must bring himself very clearly within it.

It is difficult to discover the precise ground on which the plaintiff originally based this claim. The plaint certainly does not state enough to bring him within the rules as laid down in Menu and in the Mitakshara. The plaint says this:—"Your petitioner's mater-"nal uncle, Maharajah Luchmeenath Singh "Bahadoor, agreeably to the counsel of his "father Maharajah Sidnath Singh Bahadoor, "having given in marriage your petitioner's "mother, kept her under his roof, declaring "and giving her hopes that, if a son be born "to her, such son will stand in the relation "of son's son to his mother's father, and that, "if at any time occasion arise, he will "observe the religious rites of sradh (obse-"quies), and keep the estate intact; and "accordingly your petitioner, from the day "of his birth to the present moment, lived "with the deceased Maharajahs in common "for all the purposes of board, lodging, and "worship." Now, in this statement it is not said that the Maharajah Sidnath by any act of his appointed the daughter, nor that the son, her brother, Luchmeenath Singh, did any formal act appointing her to raise a son to his father; the plaint says no more than that the latter gave her hopes that, if a son was born to her, such son would stand in that relation.

Looking at the text, it seems not only that the act of appointment must proceed from the father himself, but apparently should be made by himself, because all the forms of expression which are given are those which it is supposed the father himself would utter. In Menu, the leading passage referred to by Mr. Leith in Chapter 9, Section 127, is:—"He who has no son may "appoint his daughter in this manner to "raise up a son for him, saying, the male "child who shall be born from her in wed-"lock shall be mine for the purpose of "performing my obsequies." The passages in the Mitakshara are to the same effect. In Chapter 1, Section 11, Clause 3:—"The son "of an appointed daughter is equal to him,— "that is, equal to the legitimate son. The "term signifies son of a daughter. Accord-

* Rutcheputty Dutt Jha, Bholanath Jha, and others, Appellants, *vs.* Rajunder Narayn Rae and Coower Mohinder Narayn Rae, Respondents, 12th February 1839.

† Rany Srimuty Dibeah, Appellant, *vs.* Rany Koond Luta, Ram Rung Luta, and others, Respondents, 2nd and 3rd December 1847.

Digitized by Google

" ingly, he is equal to the legitimate son, as " described by Vasishtha:—' This damsel, " ' who has no brother, I will give unto thee " ' decked with ornaments: the son who " ' may be born of her shall be my son.' Or " that term may signify a daughter becoming " by special appointment a son." The last is not the present case. As their Lordships understand, what is set up is, not that the daughter became a son by appointment, but that she was appointed as a special daughter from whom might proceed a son who should stand in the place of a son's son. " Still " she is only similar to a legitimate son, for " she derives more from the mother than " from the father. Accordingly, she is " mentioned by Vasishtha as a son, but as " third in rank." Then the note to that is:—" The putrica-putra is of four descrip- " tions: the first is the daughter appointed " to be a son; she is so by a stipulation to " that effect. The next is her son. He " obtains, of course, the name of son of an " appointed daughter, without any special " compact. This distinction, however, " occurs: he is not in place of a son, but in " place of a son's son, and is a daughter's " son,"—that is, the son of a daughter who is herself appointed to be in the place of a son. Then there is this:—" The third " description of son of an appointed daughter " is the child born of a daughter who was " given in marriage with an express stipula- " tion in this form. The child which shall " be born of her shall be mine for the " purpose of performing my obsequies." The attempt is made to bring the appellant within this third description of son of an appointed daughter. A special form of stipulation is given. It is stated that it must be expressed, and Menu also speaks of an express appointment proceeding in the same way from the father himself upon the marriage of the daughter. In this case no appointment was made by the father, and it certainly requires positive law or evidence of a custom from which the law may be presumed, that, supposing the rule still to exist that a father may appoint a daughter for this purpose, it is a part of it that he may delegate the appointment to his sons. There is nothing said of that power to delegate being a part of the law, but, on the contrary, the rules as to the manner of appointment given in the old authorities point to the act proceeding personally from the father. The law as to adoption of sons bears an analogy to this, but the usages of that law cannot, without authority, be imported into this mode of appointment. These adoptions must stand upon the authority relating to each. In this case, there was no formal appointment by the father himself in his lifetime, and no sufficient authority has been cited to establish that what was done afterwards can have the effect of making the son of the daughter, who appears to have been married with the consent of her brother upon the condition that the husband should live in the house, equal for the purposes of succession to the son of a son. But, however the law may be, the evidence of the authority supposed to have been given by Maharajah Sheebnath to his sons, and of the exercise of it by them, is most vague and unsatisfactory. No more appears respecting the supposed exercise of it by the sons, than that when their sister married, a condition was imposed upon the husband that they should live in the Maharajah's (her brother's) house, and the son be brought up as one of his. No ceremonies are proved to have been performed, nor any express form of appointment used. This evidence seems to be wholly insufficient to establish a formal appointment which is to have the serious consequences of altering the line of succession.

On the whole, therefore, their Lordships think that the judgments of the Courts below are correct, and they will humbly advise Her Majesty to affirm them, and to dismiss this appeal with costs.

The 25th March 1875.

Present:

The Hon'ble C. Pontifex and E. G. Birch, *Judges.*

Right of Occupancy—Act VIII (B.C.) of 1869 *s.* 6—*Ejectment.*

Case No. 2765 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 30*th August* 1873, *affirming a decision of the Moonsiff of Chuprah, dated the* 12*th March* 1872.

Moonshee Jowad Hossein and others (Plaintiffs) *Appellants,*

versus

Mohabee Sahee and others (Defendants) *Respondents.*

Mr. C. Gregory for Appellants.

Digitized by Google

Baboo Mokesh Chunder Chowdhry for Respondents.

Where tenants have obtained a right of occupancy under Act VIII (B.C.) of 1869 s. 6, a suit for ejectment, against them can only be brought under that Act.

Pontifex, J.—We think this appeal must be dismissed. The plaintiff sued in the Civil Court to eject the defendants, who were occupants of the lands in suit. The defendants had succeeded two lessees, who, in 1220, had obtained a lease to hold the lands from year to year. According to the appellants' statement, the survivor of the two lessees died in October 1859; and it has been found by the Lower Courts that, upon his death, the defendants entered into possession as his representatives, and that as the possession which they took was a legal possession, the plaintiff ought to have sued under Act VIII of 1869 of the Bengal Council. We think that the lease of 1220 did not terminate on the death of the survivor of the two lessees; but that the representatives of that survivor were entitled under it to enter into possession, and their possession would be legal and proper. That being so, they would, under Section 6 of Act VIII of 1869, obtain a right of occupancy and, having that right, any suit for ejectment against them must be brought under that Act. We, therefore, dismiss this appeal with costs.

[Privy Council Ruling.]

The 25th March 1875.

Present:

Sir James W. Colvile, Sir Montague E. Smith, and Sir Robert P. Collier.

Joint Hindoo Family—Division of Ancestral Property.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Maharajah Ram Kissen Sing

versus

Rajah Sheonundun Sing and another.

As regards the joint property of a Hindoo family, there may be a division of right and interest, which will operate to change the character of the ownership from joint to separate, although it may not be intended at once to perfect it by an actual partition by metes and bounds; and therefore the agreement of a family to divide the proceeds of the joint property among its members in definite shares, with the intention that each should hold his allotted share in severalty, severs the joint interest, and extinguishes the rights springing from united family ownership.

Maharajah Ram Kissen Sing (the appellant) brought this suit in the Civil Court of Zillah Sarun, so long ago as the year 1852, to recover shares of numerous villages in Pergunnahs Mahashee and Bibrah, which he claimed as maternal grandson and heir of Rajcoomar Radha Mohun Sing, who died on the 24th December 1850.

The principal defendants, the now respondents, Rajah Sheonundun Sing and Rajcoomar Deonundun Sing, are the grandsons of Rajah Dost Doon Sing, an elder brother of Radha Mohun. Sheonundun is sued as guardian of his minor brother, Deonundun. Rajah Dost Doon died before Radha Mohun, leaving two sons, Rajah Rughoonundun, who survived his uncle, Radha Mohun, and died childless on the 16th September 1852, and Judoonundun, who was the father of the two defendants, and died in Radha Mohun's lifetime.

It appears that Radha Mohun had a son, Hurnundun, who died in his lifetime, leaving a widow, Munroop, and a daughter, Jankee. These ladies were made defendants in the suit, but do not appear in this appeal.

The family was one of distinction, and had formerly possessed considerable estates. It appears that the bulk of their property had been sold under Government and execution sales, but much of it had been again acquired by them through the powerful aid of the Rajahs of Benares, who were related to the family by marriage, and seem to have taken great interest in its welfare.

The family is governed by the law of the Mitakshara.

The plaintiff bases his claim on the ground that the property was the separate estate of Radha Mohun, to which as the son of a daughter, in default of descendants in the male line, he was, by this law, entitled to succeed as heir.

The defendants oppose to this claim two defences: (1) that the family was joint, and the property undivided, and that, consequently, on Radha Mohun's death, it devolved on Rajah Rughoonundun and themselves, as the male descendants of his brother, Rajah Dost Doon; and (2) that if this were not so, Radha Mohun made a deed of gift or will by which he declared his grand nephew, Deonundun, to be his heir, and gave all his property to him.

* From the judgment of L. S. Jackson and Macpherson, JJ., dated 11th July 1871. 16 W. R., *Civil Rulings*, 142.

Digitized by Google

It may be observed in the outset that the disposition in this alleged will (which in the commencement of the litigation was the ground of defence principally relied on) constituting Deonundun sole inheritor, to the exclusion of his uncle and brother, is not very consistent with the theory that the property with which it deals was joint and undivided family estate. It is true that the uncle and brother seem to have been consenting parties to the will, and in that way validity might have been given to it; but if the property had been really joint, it is highly improbable that such an arrangement would have been thought of.

The origin of the separation of the estate appears to have been an award of Maharajah Odeet Narain, a former Rajah of Benares, made in April 1819, by which a large part of the possessions of this family was divided into two unequal shares of 10 annas and 6 annas; the larger share being allotted to the sons of Rajah Dost Doon, the elder brother, and the smaller to Radha Mohun.

This award is recited at length in some later proceedings before a succeeding Rajah of Benares, the Maharajah Isree Pershad. This recital states that disputes having arisen between Rughoonundun and Judoonundun, sons of Rajah Dost Doon (deceased), on the one side, and Radha Mohun on the other, respecting a share of the zemindaree of certain villages, the parties had executed an ikrarnamah to the effect "that the Maharajah has the full power to fix our title and divide our shares, and whatever he should think proper to assign for any party, none of the other parties shall object thereto." It states that the Maharajah, "in order to remove doubts for ever," accepted the ikrarnamah and drew up and passed a decision, the effect of which is set forth as follows:—

"The villages detailed below in Pergunnahs Mahashee and Bibrah, which had been purchased at auction in the names of Rajah Dost Doon Sing, Baboo Radha Mohun Sing, Baboo Rughoonundun Sing, and others, and were, till then, in the joint possession of both the brothers, without specification of shares.

"Now, as Rajah Dost Doon Sing is dead, and there appear indications of disagreement between Baboo Radha Mohun Sing and the sons of the said Rajah, therefore it is settled to divide the shares; whereas these auction-purchased villages were not their ancestral property, but were acquired with the aid and assistance of the Maharajah—both the above persons knowing me as the real owner, and leaving the determination of the shares to my judgment and decision—have appeared and executed an ikrarnamah to the above effect, under their own seals, therefore, in order to the preservation, agreement, and management of both houses, in consideration of the title of both parties with respect to this sircar and old usage, and the consideration always shown to them, judgment and decision were made to this effect—that, after defraying collection expenses, and paying the Government revenue, and debts due to creditors, and costs of the Courts in the joint suits instituted previously and recently, which were joint from the lifetime of the said Rajah, whatever profits of the said villages might remain, Baboo Radha Mohun Sing and Hurnundun Sing, his son, shall take 6 annas per rupee; and Rajah Rughoonundun Sing and Baboo Judoonundun Sing, sons of the said Rajah, 10 annas per rupee; and none of them shall deviate from, or refuse this partition, and both the brothers shall remain in union with each other as they are up to the present moment. Any person who shall be appointed by the judgment of both parties shall make collections from the villages detailed below, and, after defraying the above-mentioned expenses, pay in the profits according to the division of both parties. The said villages shall remain in the name of the party in whose name they were purchased, and whose name is entered in the settlement book. With respect to the name, no one party will be able to alter or deviate from this decision, and decrease or increase the share, because the decision and division of shares is made with respect to all the villages specified below."

There is abundant evidence that this award was acted on.

The division was notified to the Collector of Sarun, as appears from the copy of a kyfeut or "memorandum of the shares of villages of Rajah Rughoonundun and Judoonundun, deceased proprietors of Pergunnahs Mahashee and Bibrah," found in the Collectorate, in which the division into shares of 10 annas and 6 annas is stated, and the 6 annas are referred to as Radha Mohun's share.

From the account books in evidence it appears that, whilst the collections for the villages were joint, the net proceeds were divided into shares in accordance with the mode of collection and partition prescribed by the award.

In several transactions Radha Mohun acted as owner of the 6 annas share. In 1842 he mortgaged, by way of conditional sale, his 6 annas share in some of the

Digitized by Google

villages. This mortgage was foreclosed in 1845, and a mutation of names effected, without the intervention of the other sharers.

Again, on the 6th February 1846, Radha Mohun made another conditional sale by way of mortgage to Sheonundun himself. The deed disclosed the fact that the other 10 annas belonged to Rughoonundun and Sheonundun. There was afterwards a suit to foreclose followed by a decree. It is evident that in this transaction the parties were treating the shares as separate estate.

Besides the above, other mortgages were made by Radha Mohun of his 6 annas share.

Some leases to indigo planters and others were put in evidence by the defendants which the proprietors of the 10 annas shares and Radha Mohun joined in granting. But their so joining is in no way inconsistent with their being owners of separate shares. Until an actual partition of the land, they were in the position of tenants in common in England, and would for convenience join in granting leases. Besides it is to be remembered that the collections were by the terms of the award to be joint.

The cases which have been recently decided by this tribunal on questions touching the separation of the joint property of a Hindoo family establish the principle that there may be a division of right and interest, which will operate to change the character of the ownership from joint to separate, although it may not be intended at once to perfect it by an actual partition by metes and bounds; and, therefore, that the agreement of a family to divide the proceeds of the joint property among its members in definite shares, with the intention that each should hold his allotted share in severalty, severs the joint interest, and extinguishes the rights springing from united family ownership.

The question of intention, as was pointed out in the latest of these decisions, must arise in all such cases, and be determined in each upon its own circumstances. (See Appovier *vs.* Rama Subba Aiyan, 11 Moore's I. A., 75. See also 3 cases in 13 Moore's I. A., pp. 113, 181, and 497, and another in L. R., 1 Indian Appeals, 55.)

Applying these principles to the evidence, it appears to their Lordships to be clear, both from the terms of the submission to the Rajah of Benares, and of his award of 1819, and also from the subsequent conduct of the parties, that their intention was that the shares specified by the Rajah should be the subjects of separate ownership.

The recital of the agreement to refer states it to have been to the effect that "the Maharajah has full power to fix our title and divide our shares." Then the award, which the recital says was made "to remove disputes for ever," states that the villages which it was proposed to divide had been purchased at auction, and were not the ancestral property of the parties, but acquired with the aid of the Maharajah. It further states that the parties knowing the Maharajah to be the real owner, had left the determination of the shares to his decision; and then the award, after determining the shares of the profits which each should take, directs that none shall "deviate from or refuse the partition."

This award carefully excludes ancestral estates, which would therefore remain joint as before, and deals only with newly acquired property, which, being purchased with his aid, the Maharajah deemed himself to be, in some sense, entitled to dispose of. It discloses throughout a general intention to give a separate ownership in the specified shares. The passage that "both the brothers should remain in union with each other as they are up to the present moment," which was relied on by the respondents as having a contrary tendency, is not sufficient to rebut this general intention. It is not at all clear that the words mean more than that the brothers should remain in concord. They would be satisfied also by supposing that the brothers were to remain joint as to the ancestral family property. But, be this as it may, the whole tenor of the rest of the award shows that, as regards the purchased estates, a final division into separate shares was intended to be made.

The evidence already referred to of the dealing with the property, and the conduct of the parties subsequent to the award, furnish very strong proof that from the first they understood the arrangement to mean a separation of ownership.

The Principal Sudder Ameen came to the opinion that this separation had been effected, in which opinion, for the reasons above given, their Lordships concur, disagreeing on this part of the case with the judgment of the High Court which overruled it.

Coming to the second defence that Radha Mohun had executed a deed of gift or will constituting his great nephew Deonundun his heir, their Lordships find that both the Courts in India, upon a full review of the evidence, have arrived at the conclusion that the execution of the instrument propounded by the defendants has not been

Digitized by Google

established. Their learned Counsel, adverting to the general practice of this Committee, admitted that no special grounds existed on which they could hope to disturb on appeal these concurrent judgments upon a question of fact; but they attempted to show that, independently of the particular instrument, the evidence was sufficient to warrant the conclusion either that a previous disposition of the property had been made by Radha Mohun to the effect of that contained in the will, or that he had so acted as to estop him and his representatives from denying that such a disposition existed.

It is to be observed that this is a new case, set up for the first time at their Lordships' bar, the defendants having throughout the suit, in all its previous stages, propounded a particular will executed by Radha Mohun, as they alleged, on the 7th September 1849.

The defence now suggested is raised neither by the defendant's answer, the issues, nor the grounds of appeal. It would, therefore, be improper to give effect to it, unless the evidence to support it was so clear and uncontradicted that it could not, without manifest injustice, be disregarded.

But this is far from being so. It appears, no doubt, that a strong effort was made in the family to induce Radha Mohun, after the death of his son Hurnundun, to come to such an arrangement. He had, it seems, incurred debts, and mortgaged some of his property, and there was a desire on the part of Rughoonundun, representing the other branch of the family, to prevent the descent of his estate in the female line.

With this view it was agreed to submit to the advice of the then Rajah of Benares. The parties accordingly attended him, and there is evidence that it was then arranged that Radha Mohun should execute a wussyutnamah or will to the effect of that propounded, and a draft of it was prepared. This took place in June 1848. It is said that Radha Mohun took away this draft, but it is not at all clear he had then determined to execute it, for, although the matter was urgent, it is not alleged that he, in fact, executed the will until fifteen months afterwards (the 7th September 1849).

A good deal of evidence was given by the defendants of acts alleged to be done by Radha Mohun in his lifetime, to corroborate the proof of the *factum* of the will. The facts disclosed in this evidence are undoubtedly deserving of consideration; but they were investigated, and the inferences sought to be drawn from them answered by the Judges of the Indian Courts in determining the question of the validity of the will. On the other hand, Mr. Cowie, for the appellant, referred to the mortgage from Radha Mohun of the 29th October 1848, and also to the fact that on the 18th January 1849, Sheonundun took proceedings to foreclose Radha Mohun's mortgage to him of the 6th February 1846, already adverted to, as being acts altogether inconsistent with the supposition that, at the time they took place, the arrangement contemplated in the month of June 1848 had been finally agreed upon.

In this state of the evidence, and of the findings of the Indian Courts upon it, their Lordships think it is not possible for them, in this final stage of the suit, to give effect to the new ground of defence raised by the respondent's Counsel.

For these reasons their Lordships must hold that the plaintiff, as heir of his maternal grandfather, Radha Mohun, is entitled to recover such of the villages enumerated in the plaint as were his grandfather's separate property.

Their decision is founded mainly on the arrangement evidenced by the award of 1819, to divide certain villages into shares of 10 and 6 annas. This award is confined to the villages "detailed below," described as having been purchased at auction by the aid of the Maharajah in the names of Rajah Dost Doon, Radha Mohun, Rughoonundun, and others, and which, it states, "were not their ancestral property." This is a clear indication that ancestral villages were to remain joint as before, and there is no evidence of any subsequent partition of such villages. The Principal Sudder Ameen seems to have been of opinion that the sons of Rajah Dost Doon were separate in food and had ceased to form a joint family; but their Lordships think the evidence is insufficient to support this conclusion. The limited partition of 1819 is inconsistent with an intention wholly to destroy the joint family, and no subsequent agreement to that effect is shown.

Unfortunately, the detail of the villages which formed part of the award is not in the record. The respondent's Counsel have contended that, at the most, only the villages contained in this detail were separated, and that there is no proof that any of the villages mentioned in the plaint were included in it. On the other hand, the appellant's Counsel have urged that the villages enumerated in the plaint being the same as those in the schedule of the alleged will, which was put forward by the respondents, it must be

Digitized by Google

assumed that the plaint contains only such separate property as Radha Mohun could have disposed of by will.

In their Lordships' view neither of these contentions is well-founded. It appears to them, with reference to the contention of the respondents that, although the detailed list contained in the award is not forthcoming, there are means in the record of distinguishing the newly purchased from the ancestral villages; and, with regard to the argument of the appellants, derived from the schedule in the alleged will, they think it cannot be assumed that it contains only separated property. Looking at the object the parties had in view in putting forward this document, it is probable that they would so prepare it as to include all the villages in which Radha Mohun had any interest, whether joint or several. Indeed, it was contended by the respondents that this will would be valid, even with regard to joint estate, by reason of its being made with the consent of the other members of the family.

This tribunal is no doubt placed in some difficulty in this matter, as they are without the assistance of the opinion of either of the Courts in India upon it. The High Court having dismissed the suit, it was unnecessary for them to consider it, and the Principal Sudder Ameen made no distinction in his final decree between ancestral and purchased property, thinking, apparently, there had been an entire separation between the brothers. Their Lordships, however, are reluctant to prolong a suit, which has been already pending upwards of twenty-two years, by directing further inquiries, especially as they think the result of the proceedings on remand, in an early stage of the cause, will enable them to dispose of the question.

These early proceedings show that the original positions taken up by the parties have been considerably shifted in the course of the litigation. In his first judgment the Principal Sudder Ameen found that this family were separate in food and estate, and then decided two things according to a bywastha:—(1) that the plaintiff, as a maternal grandson, was Radha Mohun's heir; and (2), assuming, apparently, that the villages were ancestral, that Radha Mohun could not disinherit him by will. Upon this view of the case, he did not think it necessary to decide on the *factum* of the will, although he expressed great doubt of its authenticity.

The defendants appealed to the Sudder Court, one of their main grounds being that the villages were not ancestral, but purchased by Rajah Dost Doon and his brothers, and thus were the self-acquired property of Radha Mohun, which he was competent to alienate by will.

The Sudder Court thought the Judge below had overlooked this distinction, and remanded it to him for re-trial, and especially "to determine whether any and what portion of the property sued for was acquired personally by Radha Mohun, and specifically to distinguish that from the portion which is ancestral."

A new issue was accordingly framed as follows:—"Out of the property in suit, the "estate of the maternal grandfather of the "plaintiff, what was the ancestral property of "Radha Mohun Sing, deceased, and what "was acquired by the deceased himself?"

The judgment of the Principal Sudder Ameen on this issue will be found at p. 624 of the record. It appears from his finding, which, although made for a somewhat different object, seems to be in substance sufficient for the present purpose, that, as their Lordships understand the judgment, twenty-six of the lots mentioned in the plaint, that is to say, Nos. 1, 11, 12, 18, 19, 24, 25, 33, 49, 53, 56, 74, 80, 81, 87, 96, and 105, which the Judge groups together; Nos. 13, 31, 34, 40, 50, and 51, which he places in another group; and Nos. 60, 62 (being Chuk Fatima, in Pergunnah Mahashee), and 108, which last three lots he deals with separately, were ancestral property; and that all the remaining lots were acquired by means of various purchases in the ostensible names of Rajah Dost Doon Sing, Radha Mohun, Rughoonundun, Sheonundun, and others.

The ancestral property was, as already shown, clearly excluded from the partition in 1819, and their Lordships therefore think, for the reasons already given, that the plaintiff is not entitled to recover in respect of the above twenty-six ancestral villages or lots, and that his suit as regards them ought to be dismissed.

But, with regard to the remaining lots found to be newly purchased, they think the plaintiff is entitled to maintain this suit. The bulk of these villages would seem to have been acquired before the award of 1819, which referred to large purchases then recently made; and it is reasonable to presume that the lots which were subsequently acquired were purchased and held by the brothers and their descendants in the shares specified in the award, since neither the parties themselves nor the Principal Sudder Ameen appear to have made any distinction between

Digitized by Google

the villages purchased before and after the award. They are all placed in his judgment in the category of newly-acquired estates, as distinguished from ancestral.

In the result their Lordships will humbly advise Her Majesty that the decrees of the Indian Courts be reversed, and that in lieu thereof it be decreed that, so far as regards the twenty-six lots found as above to be ancestral property, the plaintiff's suit be dismissed, and that, as to the remaining lots, that the plaintiff is entitled to a six annas share in such lots, and to possession thereof, and that the costs of the litigation in India be apportioned between the parties in the usual way, according to the value of the property to which they have been held to be respectively entitled, and in case either of the parties shall have received from the other a larger amount of costs than he would have received if the costs had been apportioned as above, the difference is to be ascertained and refunded.

There will be no order as to the costs of this appeal.

The 31st March 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Entertainment—Defaulting Guests—Damages.

In the matter of
Kalai Haldar, *Petitioner,*

versus

Shaikh Kyamaddi, *Opposite Party.*

Baboo Bykunt Nath Dass for Petitioner.

No one for Opposite Party.

Persons accepting an invitation to an entertainment at their neighbour's house, and afterwards failing to attend, cannot be held liable to recoup the entertainer for the price of the food unconsumed on account of their absence.

Jackson, J.—SHAIKH KYAMADDI brought a suit against Meghai Haldar and others, in the Court of the Moonsiff at Moonsheegunge, exercising the powers of Small Cause Court, to recover damages amounting to Rs. 33-10, on the ground that the plaintiff had invited the defendants to an entertainment at the plaintiff's house, which entertainment comprised a feast of some 150 persons; that the defendants had, after accepting the invitation, failed to attend, whereby the food prepared by the plaintiff for his guests was wasted, and the plaintiff was endamaged. The Moonsiff's judgment is in the following words:—"This suit is "brought for the recovery of Rs. 33 and "odd annas, being the sum expended by "plaintiff for making preparations for an "invitation in his house for the defendants. "It has been proved by plaintiff's witnesses "that defendants accepted the invitation "of plaintiff, but did not partake of the "feast that was prepared by plaintiff at "great expense. From this act of the "defendants, plaintiff has suffered a loss of "Rs. 30 expended by him, in preparing the "articles of food necessary for his guests. "This sum he would not have expended, had "the defendants not accepted his invitation. "As by this act of the defendants plaintiff "has suffered a loss of Rs. 30 as proved by "his witnesses, I think he will be entitled "to recover this sum from the defendants." We have referred to the evidence recorded by the Moonsiff in this case, as well as to the terms of the judgment, and we fail to find either in the evidence or in the judgment any ground whatever for holding that the defendants are liable for damages to the plaintiff for non-attendance after accepting this invitation. It does not appear either that the defendants had persuaded or procured the absence of the other persons invited, or that they entertained any special malice towards the plaintiff, or were answerable more than any other of the 150 persons for this failure of the entertainment. If persons by accepting an invitation at their neighbour's house, and afterwards failing to attend, were to be held liable to recoup the entertainer for the price of the food unconsumed on account of their absence, the risk of accepting invitations would be very serious indeed. The judgment and the evidence disclosing no ground whatever for making this decree, we are of opinion that it was entirely bad and erroneous in law, and must be set aside with costs, Rs. 16.

Digitized by Google

The 31st March 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Misappropriation by Agent—Cause of Action—Act VIII of 1859 s. 7.

Case No. 1129 of 1874.

Special Appeal from a decision passed by the Judge of Purneah, dated the 13th April 1874, reversing a decision of the Subordinate Judge of that district, dated the 9th December 1873.

Monohur Dass (Defendant) *Appellant,*

versus

Baboo Seetul Pershad (Plaintiff) *Respondent.*

Baboo Boodh Sen Singh for Appellant.

Baboo Mohesh Chunder Chowdhry for Respondent.

In a suit to recover certain sums of money misappropriated by defendant as plaintiff's general agent, where a similar suit had been brought against the same party upon a like allegation as to other sums of money, HELD that all the acts of misappropriation having occurred before plaintiff called upon defendant to render an account, constituted a claim arising out of one and the same cause of action.

Mitter, J.—I DO not think that the judgment of the Lower Appellate Court on the question of bar raised under Section 7 of Act VIII of 1859 is correct. The plaintiff seeks to recover from the defendant certain sums of money misappropriated by the latter as general agent. A similar suit was brought against the same party upon the same allegation for the recovery of certain other sums of money, and it seems to me that the items for which this suit has been brought constitute a part of the claim arising out of the cause of action alleged in the first mentioned action. The first plaint was instituted on the 20th January 1873, and it was stated there that the defendant was one of the "general" Mokhtars entrusted with the management of the plaintiff's estate in the Zillah Purneah, while the latter was a minor under the guardianship of his mother, who was residing at Monghyr; that the plaintiff attaining majority demanded an account of the defendant's management, and that no such account was furnished; that the plaintiff then made certain enquiries, the result of which was the discovery of defalcations to a large extent by the defendant. All the acts of misappropriation alleged in the present suit admittedly occurred before the plaintiff called upon the defendant to render an account of the time during which he acted as a "general" Mokhtar, and therefore naturally constitute a part of the claim arising out of the defendant's omission to render the account demanded from him, and should have been included in it.

It has been contended before us that each of these acts of misappropriation constitutes a separate cause of action; and the District Judge in overruling the objection under Section 7, Act VIII of 1859, has adopted that view of the question. The best test which can be applied to see whether this argument is sound or not is to examine whether the plaintiff could maintain an action against the defendant for an amount, received by the latter on account of the plaintiff, and not remitted to him within a reasonable time, without previously demanding an account. I am of opinion that he could not. An action against a *general* agent, simply on the allegation that he has received money on account of the principal without remitting it to the latter, is not sustainable because the facts stated do not constitute a cause of action, it being not alleged that there are grounds for believing that the money so received has not been disbursed on the plaintiff's account, but misappropriated by the agent. Where the defendant is not a general agent, but employed only to receive payment on account of the principal, and to remit it forthwith to the plaintiff, an action will lie simply on the ground that the agent has not remitted the money received by him within a reasonable time. But where he is a general agent empowered not only to *receive*, but also to *disburse*, money so received on account of the principal, a suit will not lie upon a bare allegation like that, without a further statement that the agent being called upon, has failed to account for the sum of money for which he is sought to be made liable. A reference to articles 60 and 90 of Schedule II of the new Limitation Act confirms this view of the law. I am of opinion, therefore, that the judgment of the Lower Appellate Court should be reversed, and the plaintiff's suit dismissed with costs.

Glover, J.—I concur in this judgment.

Digitized by Google

The 31st March 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Hindoo Law (Mitakshara) — Alienation of Family Property—Cause of Action—Limitation.

Case No. 69 of 1874.

Regular Appeal from a decision passed by the Subordinate Judge of Tirhoot, dated the 29th December 1873.

Mussamut Poonheet Kooer (one of the Defendants) *Appellant,*

versus

Baboo Kishen Kishore Narain Singh (Plaintiff) *Respondent.*

Mr. Branson and *Baboo Chunder Madhub Ghose* for Appellant.

Mr. J. T. Woodroffe and *Baboo Aubinash Chunder Banerjee* for Respondent.

In a suit under the Mitakshara law for possession of land by annulment of illegal sales by his father, the plaintiff's only cause of action is the taking possession by the defendant of what was the son's joint share of the family property, and his suit ought to be brought within twelve years of such adverse possession.

Glover, J.—THE plaintiff in this case sued to eject the defendant (the purchaser in possession of various portions of the family estate from the plaintiff's father Bhagwant Narain Singh), on the ground that the alienations in question, made whilst he, the plaintiff, was a minor, were declared by a decree of the Sudder Court, dated 17th September 1861, to be null and void as against him. Plaintiff attained majority in March 1866, and he brought this suit in April 1873. He dates his cause of action from the 8th of June 1861, the day on which the decree of the Sudder Court was made in his favor.

The defendant (there is only one now, the father having died since the suit was brought,) urges several objections, but it seems to me that the only one we need consider is the question of limitation. The defendant contends that the purchasers whom she represents were in adverse possession of all the properties sued for, for more than twelve years after the cause of action accrued to the plaintiff, and that his suit is therefore barred.

The Subordinate Judge decided in favor of the plaintiff, and the point we have to decide in appeal is, what was the cause of action to the plaintiff? He contends that it was the Sudder Court's decree of 1861 which annulled the father's alienations and declared plaintiff's right. Now what was the nature of the decree made by the Sudder Court in 1861? The words of his decretal order are as follow:—"Ordered that the "sale of the dwelling-houses made by the "father of the plaintiff, and the hibbanamah "in respect of the 5 mouzahs which he "stated to have been executed in his favor "by his father, be set aside; that in the "sales from 1 to 24 the sale of as much "right as belongs to the plaintiff minor be "held to be null and void. As the father "of the plaintiff is still alive, the plaintiff "is not entitled to possession, and those "parties who are benefited or prejudiced "thereby are to decide between themselves "as to whether the aforesaid transactions "are to be allowed to remain in force during "the lifetime of Bhagwant Narain, but "the Court has nothing to do with the "setting at rest the above point." Now these words seem to me very clear; the alienations of the father in respect of certain properties mentioned are declared null and void as against his minor son (the family was governed by the Mitakshara law and the estate was ancestral), and the Court declined to go into the question of possession or to decide whether or not the plaintiff was entitled to it.

In a word, the decree left the possession of the defendant whose documents of title were annulled as regards the minor exactly where it found it, and as a matter of fact the defendant has retained possession from the date of the purchase up to the present time.

The plaintiff admits that this possession was adverse to him when he brought (through his guardian) the suit decided on

Digitized by Google

appeal by the Sudder Court, and it is admittedly adverse now. The minority of the plaintiff ceased in 1866, and he could have brought his suit any time within the year 1869. He did not sue till 1873.

It is urged for the respondent that the suit of 1854 (decided in 1861) was by a proper construction of the plaint one in which the whole right and title of the minor was involved, and included the determination of the question whether he was or was not entitled to recover possession of the property, and that the decree made in it virtually determined that he would be entitled to recover that possession on the death of his father and not till then, and that this was the only relief which, as the law was then understood, the plaintiff was entitled to.

Now we have had the original vernacular decree read to us, its language is unambiguous, and its meaning is undoubtedly as I have above stated. The plaintiff's right to possession was not determined, nor was there anything in the decretal order to prevent his bringing a suit for joint possession with his father, or to compel the father to join in a partition of the ancestral property.

It is further contended on behalf of the respondent that if the Sudder Court's decision did not determine the plaintiff's right to possession on the death of his father, it was a mere declaratory decree incapable of execution, and therefore a suit could be afterwards brought upon it. On this point there are conflicting decisions, but I do not think it necessary to discuss the question, because we have in a case almost on all fours with this, a precedent that we may safely follow. It has been decided by a Full Bench of this Court in the case of Rajah Ram Tewaree *vs.* Luchmun Pershad (8 Weekly Reporter, 15), that in a suit under the Mitakshara law for possession of land by annulment of illegal sales by the father, the cause of action to the son accrues when possession is taken by the purchasers, notwithstanding that the father be then living. It may be that the law was understood differently when the decree of 1861 was made—it may be also (though upon this point I express no opinion) that had the Sudder Court declared as part of its decree that the son should be entitled to recover possession on his father's death and not till then, that his cause of action to recover might have dated from that decree; but as I have said before, the decree is silent (and reasonably so, for the suit was not for possession but merely for the annulment of the sales) as to the son's right to possession, and the law as laid down by the Full Bench (the matter was very fully argued and the decision by five Judges was unanimous) is a decision which is binding on us.

I think, therefore, that we ought to say that the plaintiff's only cause of action in a suit to recover possession was the taking possession by the defendant of what was plaintiff's joint share of the family property, and that his suit ought to have been brought within twelve years of that adverse possession.

The appeal is allowed and the plaintiff's suit dismissed with costs in all Courts.

Mitter, J.—I concur with my learned colleague in holding that the plaintiff's claim is barred by the law of limitation. According to the Full Bench decision quoted above, it is clear that the plaintiff's cause of action for recovery of possession first arose when the purchaser took possession of the property sold, and it is also equally clear that if there be no other cause of action upon which the present suit may be said to have been based, the claim is barred.

Two contentions have been raised in favor of the plaintiff upon this matter, *viz.*, (1) that the decree of 1861 furnished to him a fresh cause of action upon which he would be entitled to maintain a suit for possession within twelve years from its date; and (2) that the aforesaid decree having declared that the plaintiff was not entitled to possession during the father's lifetime by implication decided that his right to possession would accrue on the death of the father.

These two arguments are quite inconsistent with one another, because, in the one case, it is supposed that the decree gives to the plaintiff an immediate right of possession, and in the other just the contrary. But it is nevertheless open to him to rely upon each of them alternatively. To test their validity, it is necessary to examine closely the nature of the decree passed by the Sudder Court in the year 1861.

That was a suit for "adjudication of rights by setting aside" the sales made by the father. In the judgment of the Sudder Court, after giving an abstract of the facts mentioned in the plaint, the object of the suit is thus stated:—"The present suit is "instituted consequently to establish the "reversionary right of the minor plaintiff to "the property alleged to have been sold to "the defendant by the reversal of the deed "of sale as having been made by the minor's "father who is still living, contrary to the

Digitized by Google

"law of Mithila without any necessity, but "merely to satisfy, &c., &c." The defendant denied the son's right to question the sale made by the father, and further stated that it was made for legal necessity sanctioned by the *shasters*. The decree that was passed by the Sudder Court has been already set out in the judgment of my learned colleague, and it is therefore unnecessary to quote it again.

It is evident from the allegations of the parties that the suit was not for immediate possession. Probably the absence of a prayer for immediate possession may be accounted for by the fact that at that time it was supposed that a son has no right to demand joint possession with the father as long as he is alive. Whatever may be the reason, the fact remains that it was not a suit for possession.

Was it a suit for a declaration of the plaintiff's contingent right of possession to come into force after the death of the father? The plaint *expressly* does not allude to it, and although the abstract of it as given in the judgment may be construed to contain a prayer to that effect, yet we do not find it declared either in the ordering part of the judgment or in the decree. In construing this decree it ought to be remembered that a Court could not legally declare a contingent right. When a proper case is made out, a declaratory decree may be given of *existing* rights only, but not of *contingent* rights. Therefore, unless there be an *express* declaration of such contingent right in the decree of the Sudder Court, we should not infer from some expression used in it that the Court intended to declare such a right. There is admittedly no such declaration, and therefore the contention of the plaintiff in this respect fails.

As regards the other contention, I am clearly of opinion that the decree of the Sudder Court did not furnish to the plaintiff any new cause of action. It simply declared that the sales made by the father, so far as the plaintiff's rights were concerned, were invalid. The plaintiff's right to demand immediate possession as a joint member of the family existed independently of the decree which did not create any new right, the invasion of which would furnish a new cause of action to the plaintiff.

For these reasons, it appears to me that the plaintiff's claim is barred by limitation: the decree of the Lower Court must therefore be reversed, and the plaintiff's suit dismissed with costs in both the Courts.

The 1st April 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Contribution—Several Liability.

Case No. 37 of 1874.

Regular Appeal from a decision passed by the Judge of Tirhoot, dated the 12th November 1873.

Bhurut Pandey (Defendant) *Appellant,*

versus

Mussamut Munthora Kooer (Plaintiff) *Respondent.*

Baboo Issur Chunder Chuckerbutty for Appellant.

Baboo Kalee Kishen Sen for Respondent.

Where it is possible for the Court to fix the amount of liability of each of a number of co-debtors in a suit for contribution, the Court should so fix that liability.

Glover, J.—THIS was a suit for contribution. The plaintiff's husband Kalee Churn Pandey, Ram Sahoy Pandey, father of the defendant Bhurut Pandey, and Ram Churn Pandey were joint debtors in a decree which was obtained against them by Mussamut Roman Kooer and others. In execution of that decree the property of Kalee Churn Pandey was attached, and his widow, the present plaintiff, paid off the whole amount due on the decree, and released the property from attachment. She now sues to recover her excess contribution from the other co-debtors. One of them only, Bhurut Pandey appeared, and he made no serious defence to the plaintiff's claim. He objected to a small item of Rs. 42-8-6, which he said was remitted by the creditor on the occasion of the execution, in favor of all the debtors, and not as the plaintiff avers, on her own account. He likewise objected to pay interest, but this question does not arise in this appeal. The Judge found that the Rs. 42-8-6 was remitted in favor of the plaintiff alone, and for the rest held that there should be a joint decree against the two remaining judgment-debtors, allowing the defendant Bhurut Pandey credit for the deposit of Rs. 438-7 which he had paid into Court as his share of the

Digitized by Google

liability, not considering that he should still be held liable with Ram Churn Pandey for the balance due. Bhurut Pandey appeals against this decision, first, on the ground that the remission of Rs. 42-8-6 was a joint remission, and that all the judgment-debtors ought to have had the advantage of it; and secondly, that in a contribution suit the Judge was bound to apportion the liabilities of each of the judgment-debtors, and to absolve him (Bhurut) from all future liability under the decree, he having deposited in Court Rs. 438-7 his full share of the debt. The vakeel for the respondent takes no objection to the 42 rupees 8 annas and 6 pie being considered as a joint remission in favor of all the defendants, and as a matter of fact it should be so considered. It is true that the plaintiff obtained the remission of this amount from the creditors, but she was then acting as an agent for the other debtors, and the advantage which she received by the remission was not for herself only, but for the rest of the persons who were jointly liable under the decree. In any case she would not be entitled to recover the money in this suit, inasmuch as she by her own showing has paid nothing of the amount, and she would only be entitled to a refund of what she had actually paid to satisfy the joint decree.

With regard to the other question, we think on the authority of the various cases quoted to us that, where it is possible for the Court to fix the amount of liability of each of a number of co-debtors in a suit for contribution, the Court should so fix that liability. There is no objection raised here on the part of the respondent that the three debtors were not equally liable. No issue was fixed, and no evidence was taken on this point by the Judge, but the vakeel for the respondent intimates to us that his client does not wish to make any objection on this part of the case.

We think, therefore, that the Judge's order ought to be amended so far that all the co-debtors should get proportionate share of the sum of Rs. 42-8-6 remitted by the decree-holders, and that the balance due under the decree (after deducting the plaintiff's share) should be apportioned between the two remaining judgment-debtors, Ram Churn Pandey and Bhurut Pandey, and if the Rs. 438-7 deposited by Bhurut Pandey represents the half share due from him, he will be absolved from the plaintiff's claim. Under the circumstances, we think that each party ought to pay his own costs.

The 1st April 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Joint Hindoo Family—Acquisition by one Member—Presumption—Ameen's Inquiry.

Regular Appeals from a decision passed by the Judge of East Burdwan, dated the 1st July 1873.

Case No. 229 of 1873.

Jugodumba Debia and others (Defendants) *Appellants,*

versus

Rohinee Debia (Plaintiff) *Respondent.*

Baboos Oopendro Chunder Bose and *Bama Churn Banerjee* for Appellants.

Baboos Sreenath Dass and *Taruck Nath Dutt* for Respondent.

Case No. 247 of 1873.

Rohinee Debia (Plaintiff) *Appellant,*

versus

Digambur Chatterjee and others (Defendants) *Respondents.*

Baboos Sreenath Dass and *Taruck Nath Dutt* for Appellant.

Baboos Oopendro Chunder Bose and *Bama Churn Banerjee* for Respondents.

Property, purchased by a member of a joint Hindoo family in his own name, must be presumed to have been purchased with money from the family fund, unless it is shown that the money came from the separate funds of the purchaser.

In a suit in which the Court considers it necessary to order an inquiry by a Civil Ameen into the existence and value of moveable properties, such inquiry cannot be left to be made after decree, but must be made before the final decree is drawn up.

Mitter, J. — THE plaintiff, Sreemutty Rohinee Debia, as mother and guardian of minor Rakhal Doss Chatterjee, brought this suit against her deceased husband's brothers Digambur, Pitambur, and Mohesh for one-fourth share of the joint property originally held and owned by her husband and the three aforesaid defendants. She alleged that her husband died in Kartick 1276, and in Aghran 1277, the defendants forcibly expelled her and her minor son from the family

Digitized by Google

house, and thereby deprived them from the joint participation in the profits of the joint property.

The defendants deny the fact of dispossession, and allege that they are willing to make over to the plaintiff the minor's share of the properties which are really joint. Then they describe in detail the several properties which constitute their separate properties included in the plaintiff's claim. They further state that several others which they specify in their written statement are not owned and held by the brothers, but belong to other persons not parties to the suit. These persons are (1) Ram Ruttun, son of the defendant Digambur; (2) Moudakinee, Ram Ruttun's wife; (3) Jugodumba, wife of the defendant Petambur; and (4) Ram Dyal, sister's son of the defendants. All of them having intervened, have been made party defendants to this suit.

The properties claimed consist of putnee and durputnee mehals, jummai and lakheraj lands, and monies due under bonds and decrees, several moveable properties or their value, and one-fourth share of Rs. 9,827-8, which has been realized by the defendants from the debtors of the joint family. With respect to the last two items, the defendants allege that the moveable properties and a major portion of the amount realized from debtors were divided between the co-sharers, and the remainder was not in fact a debt realized on account of the joint family, but money deposited by a third party with the plaintiff's husband.

The District Judge in the Court below held that all the properties claimed, with the exception of Nos. 289 to 299 and the durputnee Mehal Kooldehee, belong to the joint family. With respect to the moveable properties, the Judge observed that the plaintiff had given no evidence of their existence and value. The Judge, however, for reasons mentioned in his judgment, was of opinion that the allegation of dispossession made in the plaint was not true, and that the suit was most needlessly brought through the evil advice of the relatives of the mother of the minor, who, he was inclined to hold, was not a fit person to represent the minor's interest as guardian. For these reasons he declined to give a decree for possession, but merely declared the minor's right to the extent of one-fourth share in all these properties, and directed that a valuation and inventory of the personal property in the family dwelling having been made by the Civil Court Ameen, the value of one-fourth share thereof be awarded to the plaintiff. The District Judge directed the costs to be borne by each party.

Against this decree all the parties have appealed, and these appeals having been brought on for hearing first before me and Mr. Justice Markby, we were of opinion that the suit could not go on unless the minor was properly represented by a fit guardian, and as the District Judge had made certain strong observations against the fitness of Rohinee Debia to act as guardian of the minor, we thought it right to direct a regular inquiry to be made by the Lower Court upon that matter. That inquiry has since been made, and the result has been favorable to the claim of Rohinee Debia to act as guardian of her minor son. No reason has been shown why the mother, the natural guardian, should in this particular case be deemed unfit to represent the interests of her minor son. We shall, therefore, in disposing of these appeals, wholly disregard the observations made by the Lower Court against the fitness of Rohinee Debia to act as guardian of her minor son.

Upon the merits of this case, we agree with the District Judge for the reasons mentioned by him that the burden of proving that the properties claimed belong exclusively to the defendants, lies upon them. We also concur with him in thinking that they have failed to discharge that burden.

From the evidence we gather that this joint family had regularly kept account books of their joint transactions. Although no direct evidence has been adduced as to the present custody of these books, yet from the surrounding circumstances I feel no hesitation in coming to the conclusion that they are in the possession of the defendants who have withheld their production. They have also failed to produce the lowazima papers, which, if their case be true, would have shown their exclusive possession. This omission on their part tells very forcibly against the truth of their case, which they have only attempted to support by the weakest direct evidence possible. Therefore, in respect of the properties decreed to the plaintiff, we come to the same conclusion at which the District Judge has arrived.

As regards the durputnee Mehal Kooldehee, we also agree with the Lower Court in thinking that the plaintiff is not entitled to a share. But the District Judge has awarded in lieu thereof Rs. 1,457-4 deposited with the defendants on account of the minor. We think that the minor is

Digitized by Google

not only entitled to this amount, but also to interest from the date of the deposit at the rate at which the original loan to the vendor of this mehal had been advanced by the joint family.

Next, as regards the properties Nos. 289 to 299, which have been excluded from the claim, we do not think that the decision of the Lower Court is correct. They were purchased in execution of a decree in the name of Ram Ruttun, and unless it be shown that the purchase-money came from the separate funds of Ram Ruttun, the plaintiff would be entitled to a share in them. It seems to us that Ram Ruttun has failed to prove that fact. Consequently, it must be presumed that the purchase-money came from the joint fund of the family, and the plaintiff is entitled to a share. The fact that the sale proceeds have been taken solely by Rohinee Debia ought not to make any difference, because by her wrongful act, the minor ought not to be prejudiced. If she has appropriated them to her private use, that would render her liable for that amount to all the members of the joint family. We are therefore of opinion that the Judge's decision upon this point ought to be reversed.

Upon the question of costs also, we think the decision of the Lower Court is not correct. It is based upon the finding that the plaintiff's allegation of dispossession has not been made out. Referring to the evidence adduced upon this point, we are of opinion that the Judge's conclusion is against the weight of it. Consequently, there is no reason why the plaintiff should not obtain the costs of this suit.

There remains to notice only one point raised in appeal, *viz.*, that the Lower Court is in error in leaving the inquiry into the existence and valuation of the moveable properties to be made by the Civil Court Ameen after the decree. This is a course clearly not warranted by the provisions of the Civil Procedure Code. This inquiry must be made before the final decree is drawn up. We must, therefore, remand this case to the Lower Court to complete this inquiry and then to draw up a final decree according to the result of that inquiry and the conclusions at which we have arrived upon the other contested questions in the case. The result therefore is that the plaintiff is entitled to recover possession of one-fourth share of all the properties claimed with the exception of Kooldehee property No. 2. With respect to the monies due under bonds and decrees, the plaintiff is entitled to a declaration that the minor's share is one-fourth. She is also entitled on behalf of her son to a decree for money against the original defendants, the amount of which is to be calculated according to the directions contained in our judgment in connection with her claim regarding items Nos. 2, 280 to 285 mentioned in the schedule of the plaint. A decree is also to be given for the moveable properties according to the result of the inquiry which we have directed to be made. The plaintiff is entitled to costs in all the Courts against the original defendants, and the costs of the intervening defendants are to be borne by themselves.

The 1st April 1875.

Present:

The Hon'ble C. Pontifex and G. G. Morris, *Judges.*

Sale of Minor's Property by Guardian—Legal Necessity—Ex-parte Decree against Minors.

Case No. 320 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Bhaugulpore, dated the 30th October 1873, reversing a decision of the Subordinate Judge of that district, dated the 9th April 1873.

Syud Lootf Hossein and others (Defendants) *Appellants,*

versus

Dursun Lall Sahoo and others (Plaintiffs) *Respondents.*

Mr. C. Gregory for Appellants.

Baboo Kalee Mohun Doss for Respondents.

The mother and guardian of two minors borrowed Rs. 1,000, ostensibly for their marriage expenses. The lender of the money obtained an *ex-parte* decree against the minors, and in execution attached their estate, when the mother, in order to save it from sale, sold half the estate for Rs. 2,500, out of which she satisfied the decree. One of the minors subsequently brought a suit against the purchasers to set aside the sale:

HELD that it was obligatory on the defendants to prove that, in selling the property, the mother acted under an unavoidable necessity in the interests of her minor sons, and that the decree against the minors was such as would bind their interests.

Pontifex, J.—IN this case the plaintiff sues to set aside the sale of his 2 annas share in certain property sold in the year 1858 by his mother and guardian.

The circumstances under which the sale was made were as follow:—The plaintiff is

Digitized by Google

one of four sons. His two elder brothers were of age when their father died, and they separated from the younger brothers and the mother. The mother, in the year 1856, borrowed a sum of money, amounting to about Rs. 1,000, ostensibly for the benefit of the minors for their marriage expenses. The lender of that money in 1858 obtained a decree against the minors for the money so lent: that decree was obtained in an undefended suit. Subsequently, the plaintiff in that suit took out execution, and, in April 1858, a sale in execution was about to take place of the 8 annas share of the two minors which had been attached by the plaintiff. In order to save the property from being sold at auction under such execution, the mother sold 4 annas out of the 8 annas share of the minors to the present defendants for the sum of Rs. 2,500, and satisfied the decree with part thereof. The plaintiff now brings this suit to set aside the sale of his 2 annas share of that 4 annas, and he alleges in his plaint that his mother, as guardian, had no power to sell his share, inasmuch as there was no necessity which would have authorized her to do so.

We are of opinion that, as the sale was made during the minority of the plaintiff at a time when he could know nothing of the circumstances of the case, it was obligatory on the defendants to prove that, when the original loan was taken by the widow, it was a loan taken for the benefit of the infants. Mr. Gregory, in the appeal before us, has argued that there was no such onus upon the defendants; and that, inasmuch as in 1858, there was an actual sale in execution of a decree pending against the property of the infants, it was not necessary for the purchaser of the 4 annas to look beyond that decree to see whether it bound the minors, and he referred to a case in XXII Weekly Reporter, page 56, as supporting that view. That case is a decision of the Privy Council on the Mithila law, and is a case in which a decree had been obtained against a father and a sale made under it. We think that case has no bearing on the present one. We repeat that, in this suit, it was incumbent on the purchaser to satisfy himself that, in selling the property, the mother acted under an unavoidable necessity in the interests of her minor sons, and for this purpose it would be necessary for him to ascertain that the decree of 1858, which was a decree against the minors, was such a decree as would bind the minor's interests.

In the first Court an issue was raised whether the plaintiff's father, at the time of his death, had property, the produce of which was sufficient for maintenance. This is perhaps not a very precise issue; but the obvious intention was to put the defendant upon showing that there was no sufficient property left by the plaintiff's father to prevent the widow borrowing this sum of money for the interests of the minors. The Moonsiff found in favor of the plaintiff, and found, upon his view of the evidence before him, that the original decree against the 8 annas was not a decree which validly bound the minor's interests.

Against that decree, the plaintiff appealed to the District Judge, who, in the commencement of his judgment, states what in his opinion is the issue between the parties. He says:—"The issue in this case is the validity of a sale made by the mother and guardian of the plaintiff during his minority;" and he says that, though the Subordinate Judge has not laid down this issue very precisely, the point on which the case turns, and on which the Subordinate Judge has decided it, is, whether such necessity existed as would justify the guardian in alienating the property, and whether the purchaser sufficiently satisfied himself of the existence of such necessity. But we find that the Judge did not in fact try that issue. He seems to have thought it unnecessary to decide whether the original decree bound the minor's interest in the 8 annas. But whether it did or did not bind their interest, he found that the original decree being only for Rs. 1,000, the sale of 4 annas for Rs. 2,500 to a person who he states was the widow of the guardian's mokhtar was an improper sale, and he therefore set it aside: and he states at the end of his judgment that he "has not considered it necessary to go at "length into the question of whether the "decree for Rs. 980 was one which the "minor could fairly repudiate. This point "would have been gone into had the present "suit been for the whole property. Plaintiff, "however, claims only half; and as the other "half remaining in the hands of the pur-"chaser represents a sum larger than that "paid in liquidation of the decree, the "minor's liability on account of that decree "need not be carefully scrutinized."

We are of opinion that this suit was instituted, not to set aside the sale to the defendants as a fraudulent sale made to a mokhtar, but simply to set aside the sale as made improperly by the minor's guardian.

Digitized by Google

The whole question therefore is, was the minor's interest in the property bound by that decree under which execution had been taken out in 1858, to prevent a sale under which execution the sale to the defendants was made. We think that the case must go back for the Judge to try upon the evidence on the record the issue whether or not the defendants, upon whom the onus lay, have proved that the decree under which execution was pending in 1858 was such a decree as would bind the minor's interests. If it was such a decree, then the sale to the defendants must be supported; if it was not such a decree, then the sale must be set aside. The costs of this appeal and the costs in the Lower Courts will follow the result.

The 2nd April 1875.

Present:

The Hon'ble C. Pontifex and G. G. Morris, *Judges.*

Suit for Assessment of Rent—Jurisdiction—Evidence taken in Collector's Court.

Special Appeals from a decision passed by the Judge of Bhaugulpore, dated the 13th March 1874, *modifying a decision of the Sudder Moonsiff of that district, dated the 30th August* 1873.

Case No. 897 of 1874.

Gopee Nath Ghose (Plaintiff) *Appellant,*

versus

Kedar Nath Chuckerbutty (Defendant) *Respondent.*

Mr. M. L. Sandel and *Baboo Mohinee Mohun Roy* for Appellant.

Baboos Rash Beharee Ghose and *Taruck Nath Dutt* for Respondent.

Case No. 1271 of 1874.

Kedar Nath Chuckerbutty (Defendant) *Appellant,*

versus

Gopee Nath Ghose (Plaintiff) *Respondent.*

Baboos Rash Beharee Ghose and *Taruck Nath Dutt* for Appellant.

Mr. M. L. Sandel and *Baboo Mohinee Mohun Roy* for Respondent.

A suit for arrears of rent of land for which no rent has ever been paid, where plaintiff asks also for assessment of the rate of rent, is not cognizable in the Small Cause Court.

In such a case where the tenure had commenced thirty years previously, and had been in the possession of defendant's grandfather, father, and himself without any rent having been paid, HELD that, in deciding whether the relation of landlord and tenant existed between the parties, the Civil Court was entitled to look at evidence taken in the Collector's Court being that of witnesses who had been examined and cross-examined by the present defendant when the suit was originally tried there.

Pontifex, J.—IN this case the plaintiff sues for arrears of rent for three years. Originally he brought five several suits in the Collector's Court to enhance the rent of this very land. *Ex-parte* decrees were passed in three of these suits; one suit was dismissed, and one was appealed and came before this Court, and it was ultimately held that the Collector had no jurisdiction to try that case. The present suit was then brought in the Civil Court, and was for three years' arrears of rent at the rates sought in the Collector's Court.

It is objected now before us for the first time that properly this suit ought to have been brought in the Small Cause Court; but seeing that it is the case of both parties that no rent was ever paid for any part of this land, and seeing that this was a suit not only for payment of arrears, but for assessment of rent at the rate for which arrears were claimed before, we are of opinion that it is not a suit cognizable in the Small Cause Court.

After its institution in the Civil Court, an appeal was made to this Court, and the Judges of the Division Bench, who heard the appeal, remanded the case by their order of the 3rd of August 1872. We are clearly of opinion that we cannot go behind that order. The learned Judges on that occasion said that the land consisted of three plots. One plot, which they called A, they said the defendants claimed as brahmottur land, and the second and third plots, which they called B and C, they said the defendants claimed as mokururee, B being covered by the three *ex-parte* decrees. They remanded the case to the Lower Court with this order:—"It will "therefore be for the Lower Court to "determine whether in respect of plot A, "the relation of landlord and tenant did exist "between the parties; and if so, what was "the fair and equitable rent.

"In regard to plot B, the Lower Court "is to find whether the allegation of mokur-"uree is proved or not; and if not, whether "the rents awarded by *ex-parte* decrees are "fair and equitable; and if not, what is the "fair and equitable rent.

"The same remarks apply to plot C."

Digitized by Google

On that remand, both the Courts below have held, in respect of plot A, that it is not brahmottur land, but that the relation of landlord and tenant did exist between the parties.

An objection has been made before us that the Lower Courts in coming to that decision based their finding on certain evidence which was taken in the Collector's Court, being the evidence of three witnesses who were examined in the Collector's Court, and cross-examined by the present defendant. We think that under the circumstances of the case, the tenure having commenced thirty years ago, and having been in the possession of the defendant's grandfather, father, and himself without any rent having been paid for it, the Judge was entitled to look at that evidence for the purpose of deciding whether the relation of landlord and tenant did exist. There was evidence, therefore, on which the Courts below could come to that finding, and this being a special appeal we cannot go behind that finding.

Then, with respect to plots B and C, both the Courts have held that the defendant has failed to prove the mokururee. The question, therefore, which now arises is, whether the findings of the Lower Courts have been in accordance with the remand order. The Moonsiff found, with respect to plot A, that the rent reservable was a particular sum. Upon appeal from that finding the Judge held that such sum was the fair and equitable rent at the present day, but that it was not the meaning of the Court which remanded the case to ascertain the rate of the present day; and that the fair and equitable rate intended by the remand order was the rate which would have been imposed when the tenancy was first created.

We quite agree with the argument of the defendant's pleader that, in determining what should be the fair rent, all the circumstances should be taken into account. We think it is a material circumstance that the defendant met the plaintiff's case, not by admitting that there was the relation of landlord and tenant, but by asserting that they have a positive title which the plaintiff could not defeat; and when this Court sent the case back, the fair and equitable rent which it intended should be assessed was the fair and equitable rent on such lands at the present day. This opinion also affects the finding as to plots B and C, on which plots both the Lower Courts have held that only a rent of 8 annas could be reserved; that being the rent imposed at the time of the original lease thirty years ago. We are of opinion that that was not the intention of the Bench which remanded the case.

It must be remembered that, with respect to plot B, suits for enhancement had been brought in the Collector's Court. Those suits must have been for rates payable at the present day, and in the remand order the Bench makes express reference to the rent given in the *ex-parte* decrees, which must have been according to a valuation at the present day. If it was intended that the rent which was payable at the commencement of the lease was to be reserved, the Judges who remanded the case would have said so. Not having said so, and having left the Lower Courts to find what was the fair and equitable rent, we are of opinion that they intended that rent should be assessed according to the rates prevailing now.

As, however, both the Courts have found, with respect to plots B and C, that the rent could only be 8 annas reserved in the original lease, we must remand that part of the case for them to try what is the fair and equitable rent to be paid on such lands at the present day.

The plaintiff's appeal will be decreed with costs in this Court and in the Courts below, and the defendant's appeal will be dismissed with costs. The further costs in the Courts below will be left to the discretion of those Courts.

The 2nd April 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Attachment of Prospective Right of Maintenance —Act VIII of 1859 *s.* 205.

Case No. 43 of 1874.

Regular Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 11*th December* 1873.

Monessur Doss (Plaintiff) *Appellant,*

versus

Maharajah Kishen Protab Shahee and another (Defendants) *Respondents.*

Baboos Hem Chunder Banerjee and *Chunder Madhub Ghose* for Appellant.

Mr. R. T. Allan and *Baboo Unnoda Pershad Banerjee* for Respondents.

A prospective right of maintenance cannot be attached, and a contingency of this kind is not included in Act

Digitized by Google

VIII of 1859 s. 205 as something capable of attachment.

Glover, J.—THE plaintiff (appellant) held a decree against Beer Pertab Sahai, a relative and pensioner of the Hatwa Rajah, and in execution thereof attached prospectively the allowance of his judgment-debtor from the Rajah which was Rs. 1,000 monthly from January to July 1871. This was done in July 1870. The right of the judgment-debtor in this allowance was afterwards put up for sale in execution, and was purchased by the plaintiff for something over Rs. 3,000.

The point we have to decide in this appeal is whether there was any valid attachment subsisting of the judgment-debtor's maintenance allowance for the six months of the year 1871.

The order of attachment, made on the 8th of July 1870, was set aside on the petition of the debtor on the 12th of September following. It has been contended for the plaintiff (appellant) that this order was in its turn reversed by the High Court, and the original attachment revived, but this is not so. The High Court made no order affirming the attachment, on the contrary it stated as a known rule of law that a prospective right of maintenance could not be attached; but it in view of all the circumstances of the case pointed out a way in which the creditors could be eventually satisfied whilst the debtor still retained enough of his allowance to live on, and the Court directed that the Rajah should be called upon to pay to such persons as the Judge might direct a certain proportion of the allowance month by month as it became due. Nothing seems to have been done, however, till April 1871 when the Judge informed the Rajah that he intended on the 12th of May following to make an order fixing the several amounts to be paid to the debtor for his maintenance and into Court for the satisfaction of his creditors. In reply to this, the Rajah professed his willingness to pay the allowance as directed from December 1871, alleging that the allowance for the preceding months had been already paid in advance to Pertab Sahai. There is evidence of these payments on the record, and we see no reason to differ from the finding of the Subordinate Judge that these payments were really made to Pertab Sahai. No attempt has been made on the part of the plaintiff to show that these payments were otherwise than *bonâ fide* on the part of the Rajah. It may be that he was not unwilling to serve his relative at the expense of the latter's creditors; but as there was no attachment existing on the maintenance allowance, the Rajah could lawfully pay it to the recipient in any way he liked. The claim of the plaintiff is against the allowance for the months of January to July 1871: the greater part of this would already have been paid as a matter of course before the Judge's order reached the Rajah, and there was nothing to prevent payment of the rest in advance before the Judge forbad any further appropriation. In fact, the only way (no fraud being proved) in which the plaintiff can have a claim to this money is by showing that the attachment of July 1870 subsisted throughout, and in this he has altogether failed. He tries to make out that the High Court's order reimposed the attachment, but this, as we have before remarked, neither was nor could have been the case. Moreover, Section 205 of the Procedure Code does not include a contingency of this kind as something that could be attached. We think that the Subordinate Judge was right; that there never was any valid attachment of the judgment-debtor's allowance. If there ever was such attachment, it had ceased in 1870, and was never re-imposed. What the plaintiff bought in execution was the right to get his money from the allowance of the debtor after it was paid to him, a right that he always had: he bought no lien on the salary not due.

The appeal must be dismissed with costs.

The 5th April 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Indigo—Ijmalee Lands—Consent of Ryots.

Case No. 893 of 1874.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 27th January 1874, *reversing a decision of the Officiating Additional Moonsiff of Begoosserai, dated the 29th May* 1873.

Hunooman Singh and another (Plaintiffs) *Appellants,*

versus

Mr. L. Crowdie and others (Defendants) *Respondents.*

Baboos Obhoy Churn Bose and *Nil Madhub Sen* for Appellants.

Mr. M. L. Sandel for Respondents.

Digitized by Google

A crop such as indigo, which is incapable of being profitably attached for arrears of rent, may be grown on ijmalee land with the consent of the ryots.

Glover, J.—THIS was a suit by one of the proprietors of Mouzahs Mujhoulram and Hunsy for an injunction to restrain the defendant No. 1 Mr. Crowdie, an indigo planter in the district, from sowing indigo in certain khodkast lands belonging to the joint proprietors of those mouzahs, and likewise in other lands which are said to be the ijmalee lands of the estate in the possession of cultivating ryots. The defence was that the khodkast land in which indigo was sown was the separate property of the other shareholders with whom the defendant had come to terms for the purpose; and that as the ryots of the ijmalee lands had consented to the defendant's sowing indigo in it, the proprietors had no right to prevent his doing so. The Moonsiff considered that the defendant could not sow indigo without the consent of all the proprietors of the mouzah and granted the injunction. On appeal the Judge reversed that order on two grounds: first, because he found it proved that the khodkast land in which the defendant sowed indigo was the separate property of the joint owners of the estate, and that the plaintiff had no concern with this land; and, secondly, because he considered that the consent of the ryots had been obtained for sowing indigo in the ijmalee lands.

With regard to the khodkast land there is no objection taken before us.

With regard to the ijmalee land cultivated by ryots, we are referred to a similar case to be found in XVI Weekly Reporter, page 41, to which the present defendant was a party. In that case it was held, with regard to the cultivation of indigo upon ryotee land, that the defendant had no right without the consent of the co-sharers to grow a crop which was not capable of being profitably attached for arrears of rent, that indigo plant was a crop which was valueless except when converted into the manufactured article, and that growing such a valueless crop was tantamount to an entire alteration of the condition of the joint property. This would be a case very much in point if the facts were the same. But the *dictum* of law laid down in the first part of the decision is so far as this case is concerned qualified by the words found at the end of the judgment where the learned Judges say:—"We think "that the defendant should be restrained "from growing or causing to be grown indigo "on the ijmalee lands without the consent "of all the proprietors or ryots who hold "tenures in the ijmalee lands." Now in the present case the Judge states in his judgment, and the fact was not disputed, that the consent of the ryots had been obtained by the defendant. And in another part of his judgment he says:—"In this case the consent "of the ryots appears to have been obtained." It is urged that this finding was come to upon no evidence. But the plaintiff came to Court desiring that the defendant might be restrained from growing indigo on this particular land on the ground that he had forcibly compelled the ryots to sow it. It was therefore for the plaintiff to prove the fact that indigo had been grown in the ijmalee lands against the consent of the tenants in possession thereof, and as to this there is absolutely no evidence whatever. The Judge's decision is therefore correct and must be affirmed with costs.

[PRIVY COUNCIL JUDGMENT.]

The 11th March 1875.

Present:

Sir James W. Colvile, Sir Barnes Peacock, and Sir Montague E. Smith.

Arbitration Award—Act VIII of 1859 *ss.* 324 *&* 325*—Appeal—Resignation of Arbitrator.*

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Maharajah Joymungul Singh Bahadoor

versus

Mohun Ram Marwaree.

A suit having been referred by the District Judge to arbitration, the arbitrators made their award, and the Judge passed a decree in conformity therewith. That decree on appeal was set aside for irregularity, the award having been signed by the arbitrators separately and ten days not having been allowed for objections; and the case was remanded with a view to these defects being cured. On remand one of the arbitrators in a letter to the Judge tendered resignation; but was induced to withdraw it. The award was then properly signed and, after objections heard, duly adjudicated upon under Act VIII of 1859 ss. 324 and 325. A decree was then passed:

HELD, that no appeal lay from this decision to the High Court, and *à fortiori* none lay to the Privy Council.

HELD, that the arbitrator, who first tendered and then withdrew his resignation, did not formally divest himself of his character of arbitrator, and was therefore not *functus officio* when he signed the award.

THIS is an appeal against a judgment of the High Court, dated the 18th January

* Remand order by Kemp and E. Jackson, JJ., 6th March 1868; second remand order by Norman and E. Jackson, JJ., 14th September 1869, 12 W. R., 397, decided by Norman and Loch, JJ., 18th January 1871.

Digitized by Google

1871, which dismissed an appeal that had been brought against a judgment of the Zillah Judge of Bhaugulpore, dated the 1st February 1870.

The circumstances out of which this appeal arises are shortly these:—The respondent, who is a mahajun, sued the appellant, who is a person of high rank in the district, for the balance of an account arising out of transactions between them. That suit was first dismissed. There was an appeal by the respondent from that decision to the High Court, and the High Court remanded the case for re-trial to the Zillah Judge with certain directions. Upon its coming back to the Judge, it was suggested by him that all matters in dispute should be referred to arbitration; and that was done by the consent of the parties,—the arbitrators being a European gentleman, formerly the Judge of Bhaugulpore, and a member of the Bengal Civil Service, and a Mahomedan who exercised judicial functions in the district as the Judge of the Small Cause Court. Those gentlemen entered upon the inquiry, and in the course of it certain books of account which had been produced by the plaintiff were, on his application, given back to him. He took them out of the hands of the arbitrators, meaning, as he says, to bring them back; but they were, according to his account of what happened afterwards, taken from him by violence; and in any case they disappeared, and have not since been forthcoming. The arbitrators, however, made their award. It is not necessary to state in detail the form in which it was made. It suffices to say that they did not sign that award, as first made, together. The Mahomedan Judge first expressed his opinion, and after going through the facts stated that in his opinion the balance found by him to be due should be paid by the appellant to the respondent. It then went to Mr. Sandys, the other arbitrator, who seems to have made further inquiry, and to have had some communication on the subject with his co-arbitrator. But the award was on that occasion signed by them separately. It was then filed in the Zillah Court, and the Judge passed a decree in conformity with it. From that decree there was an appeal to the High Court, and the decree was set aside, and properly set aside, by the High Court, apparently on two grounds. The first was that the Judge had proceeded irregularly, inasmuch as he had passed his decree without allowing the parties the ten days for bringing in objections to an award which the Code of Procedure allows them. The other ground on which the learned Judges of the High Court, or at least Mr. Justice Norman, proceeded, was that the award was altogether informal, inasmuch as it had been signed by the arbitrators separately. The result of that proceeding in the High Court was that the judgment appealed against was reversed with costs, and the case sent back to the Zillah Judge,—Mr. Justice Norman observing:—"The Judge will consider "whether it would not be proper to send "back the papers signed in pursuance of his "former suggestion that an award may be "duly and regularly signed by the arbitrators "in the presence of each other." And in another passage he said:—"We leave it to "the Judge, on hearing any objections made "by the defendant, or on the application of "the plaintiff for that purpose, to remit the "award to the arbitrators under the provi-"sions of the 323rd Section, if he thinks "that the ends of justice will be served "thereby." The other Judge, Mr. Justice Elphinstone Jackson, after expressing a doubt whether there was any informality in the separate signature by the arbitrators, says:—"As, however, my learned colleague "is of an opposite opinion, I am ready to "concur with him in remanding this case to "the Judge, in order that he may take steps "to have the award formally signed by the "arbitrators at the same time, and not on "different dates. I think also that there "must be a remand, in order that the appel-"lant may obtain ten days' time after the "award is signed within which to prefer any "objection he can legally urge against the "award."

Now, Mr. Doyne has pressed strongly upon their Lordships that the intention of the Court in making this remand was that the case should go back again to the arbitrators for re-consideration and re-adjudication before it came at all before the Judge in the shape of an award, and that it was an essential part of that proceeding that the missing books should be produced and considered by the arbitrators, or that, if they could not be produced, their loss should be in some manner enquired into and accounted for. But their Lordships do not take that view of the order of remand. It seems to them clear, upon the face of the judgments of the learned Judges, that their intention was that the case should go back to the Judge; that he should in the first instance have the award put into a formal shape by getting it signed by both the arbitrators

Digitized by Google

together ; that when so signed it should be regularly filed ; that the parties should have ten days within which to take their objections, whether founded on the abstraction of the books, or any other legal ground, to the validity of the award ; and that the Judge should then proceed to adjudicate upon those objections. He himself seems to have taken that view of his duty, and he accordingly proposed to have the award signed by both the arbitrators in his presence. Then arose a new difficulty. Mr. Sandys, taking exception to some things that had been done, wrote a letter to the Judge, in which, after stating these objections, he says :—"Under "the circumstances above detailed, I feel "that I cannot with any seemly propriety "continue to act any longer in this arbitra- "tion ; and in the perplexity this gives rise "to, I can discover no other alternative to "be left me than herewith to submit my "resignation." The Judge was very unwilling to accept that resignation, and induced Mr. Sandys to withdraw it. The result was that Mr. Sandys and the Mahomedan gentleman came before the Judge ; they signed the award ; the award was then regularly placed upon the file of the Court, and formal objections were brought in by the appellant. One of these objections, the 5th, was that the act of the Moulvie (the Mahomedan arbitrator) in allowing the plaintiff to take away his books was an irregular and illegal proceeding, and amounted to such misconduct as would vitiate the award. The Judge adjudicated upon those objections, under the 324th and 325th Sections of the Code of Procedure, and overruled them. He then made a decree in conformity with the award, going neither beyond it, nor altering it in any way. Upon that there was a final appeal to the High Court, which resulted in the judgment now under appeal.

Their Lordships entirely concur with the first point taken by the learned Judges of the High Court, namely, that the appeal was an appeal against the judgment passed in pursuance of an award made by the arbitrators ; and that the judgment, being in accordance with the award, was, under the 325th Section of the Code of Procedure, final. If this were so, it follows that no appeal lay against that decision of the Judge to the Court ; and, *à fortiori*, that this appeal from the judgment of the High Court cannot be maintained. Their Lordships have already dealt with the objection raised by Mr. Doyne, to the effect that the award was not in fact an award within the meaning of the Code of Procedure, inasmuch as it had not been made pursuant to the instructions with which the case was remanded ; and that the arbitrators ought again to have considered the questions referred to them with the books, if they could get them, or to have pursued the inquiry concerning the books. Therefore, it is not necessary to say more upon that point.

It was, however, further objected that the award was informal, and not properly the subject of a final adjudication by the Judge, because Mr. Sandys, at the time when he signed it, was *functus officio*. But their Lordships, looking to the mode in which he merely tendered his resignation to the Judge in a letter addressed to him, and afterwards withdrew it at the request of the Judge, are of opinion that he never formally divested himself of his character of arbitrator ; and concur with the High Court in thinking that the award was a formal award ; that there has been an adjudication as to its validity, and that that adjudication is final.

Their Lordships will therefore humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal with costs.

The 22nd March 1875.

Present :

The Hon'ble W. F. McDonell, *Judge.*

Possessory Suit—Onus Probandi.

Case No. 1328 of 1874.

Special Appeal from a decision passed by the Additional Judge of Backergunge, dated the 31st March 1874, *confirming a decree of the Moonsiff of Madareepore, dated the 19th August* 1872.

Nistarinee (Plaintiff) *Appellant,*

versus

Kalipershad Dass Chowdhry and another (Defendants) *Respondents.*

Baboos Bhoobun Mohun Dass and *Radhica Churn Mitter* for Appellant.

Baboo Grija Sunkur Mozoomdar for Respondents.

In a suit to recover possession of an ousut talook on the allegation of having been dispossessed by the purchaser of the zemindaree right, HELD that defendant as

Digitized by Google

the superior landlord having *primâ facie* title, the onus lay on plaintiff to defeat that title by proving the grant of an intermediate tenure.

THIS is a suit to recover possession of a certain ousut talook. The Moonsiff who first tried the case held that the suit was barred by limitation under Section 27 Act VIII (B.C.) of 1869 and also on the merits he found that the plaintiff had not proved her title. On appeal to the Judge he held that the case was barred by limitation and dismissed the appeal on that ground without going into the merits.

On special appeal it was held by Mr. Justice Phear that this was not a suit belonging to the class of cases defined in the words of Section 27 Act VIII (B.C.) of 1869; that in fact it was not a suit based on possession only but on title, and that the plaintiff set out her title and sought to have her right declared and possession given her in pursuance of that title. Considering, therefore, that the Lower Court was bound to decide the case on its merits and that Section 27 did not apply, the case was remanded for trial on its merits. The Additional Judge has on remand held that the plaintiff has not been able to prove her title, and he agrees with the Court of first instance in the decision arrived at on the merits. In special appeal it is now urged that when the Judge below found the fact of forcible dispossession of the defendant to be proved, he ought to have thrown the onus of proof on the defendants, and not having done so he has erred in law. It appears that this very point was taken before the Moonsiff, for in his judgment he says :— "It is contended that plaintiff having proved "forcible ouster on the part of defendant "No. 1, is entitled to recover possession "unless a better title is made out on behalf "of the latter. To this contention my "simple answer is that defendant No. 1 "being the owner of the shares under which "the ousut talook is said to subsist, has the "best of titles to retain khas possession, and "plaintiff having invoked the assistance of "Court after the lapse of one year from the "date of her ejectment, must be considered "to have taken upon her head the onus of "proving title, and therefore, until that onus "be discharged there is little hope for her "to obtain her ends otherwise." He then goes on to give his reasons why he considers the plaintiff had failed to prove her title. It is now urged in appeal that the superior title of the defendants was never admitted, but when the plaintiff had stated that she purchased the ousut talook and the defendants after purchasing the superior right had dispossessed her, and when the Moonsiff so distinctly found that the defendants held the superior right, if the plaintiff had any objection to that finding she ought to have urged it in appeal and is not entitled to raise that point for the first time in special appeal. I am of opinion that the defendant being shown to be the superior landlord, in fact, the zemindar, and as such having had *primâ facie* title, it lay upon the plaintiff to defeat that right by proving the grant of an intermediate tenure. That appears to me to be in accordance with the ruling of the Privy Council in the case of Rajah Saheb Proladh Sen which is quoted in 12 W. R., Privy Council Rulings, page 17. Considering, therefore, that the onus was properly shifted on to the plaintiff's shoulders, there appears to be no error in law in the decision of the Lower Appellate Court. The appeal is, therefore, dismissed with costs.

The 5th April 1875.

Present :

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Rights of Fishery—Right of Occupancy.

Case No. 920 of 1874.

Special Appeal from a decision passed by the Judge of Purneah, dated the 4th February 1874, *affirming a decision of the Subordinate Judge of that district, dated the* 21*st August* 1873.

Sham Narain Chowdhry and another (Defendants) *Appellants,*

versus

The Court of Wards on behalf of the Rajah of Durbhangah, minor (Plaintiff) *Respondent.*

Mr. R. T. Allan and *Baboo Hurechur Nath* for Appellants.

Digitized by Google

Baboo Unnoda Pershad Banerjee for Respondent.

Where a jotedar had exercised rights of fishery over two julkurs for more than twelve years, not as the owner of the jote (with which the julkurs were not connected), but as a tenant under a landlord, HELD that such possession did not confer upon him a right of occupancy.

Mitter, J.—THIS is a suit brought by the plaintiff to prevent the defendant from exercising right of fishery in two fisheries, called Ramcoondee and Bulwadhur. The defendant alleges that they are part of an ancient jote jumma belonging to him, and that the plaintiff is not entitled to prevent him from exercising the right of fishery in them. The questions that have been tried in the Court below are these :—Whether these julkurs were appurtenant to the defendant's jote, or they were separate tenures in the possession of the defendant, and whether the defendant had acquired any right to retain possession of them, notwithstanding the unwillingness of the landlord to leave them in his possession.

Both the Courts below have decreed the plaintiff's claim. The District Judge in appeal has found with reference to the Julkur Ramcoondee that it is entirely a separate fishery, and not connected with the defendant's jote. He has also found with reference to the other fishery, Bulwadhur, that it forms a continuous fishery with another, and that it is also not connected with the jote belonging to the defendant.

It is contended in special appeal that there is no evidence to support this finding. We have referred to the record, and we find that there is evidence by which this finding could be supported. That being so, it is clear that the defendant has been exercising rights of fishery over these two julkurs not as the owner of the jote, but as a tenant under the plaintiff, his rights therein being quite unconnected with his rights in the jote. Although the defendant has been in possession of these julkurs for more than twelve years, yet that fact does not confer upon him a right of occupancy under the Act. The plaintiff's suit has therefore been rightly decreed, and we see no reason to interfere with the judgments of the Lower Courts.

The special appeal is dismissed with costs.

The 5th April 1875.

Present :

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Amendment of Decree—Review—Limitation.

Case No. 2030 of 1874.

Special Appeal from a decision passed by the Judge of Cuttack, dated the 2nd April 1874, affirming a decision of the Moonsiff of Jahajpore, dated the 31st May 1872.

Bulobhuddur Mahantee and others (Defendants) *Appellants,*

versus

Mudhoosoodun Pandey (Plaintiff) *Respondent.*

Baboo Kashee Kant Sen for Appellants.

Baboo Umorendro Nath Chatterjee for Respondent.

Where the first Court's decree in favor of the plaintiff was upheld in appeal, but in the course of the execution proceedings, the Lower Appellate Court held that its judgment did not mean to uphold that decree in its entirety, it was held that this order was in the nature of an amendment of the decree, and that the ninety days allowed for an application for review should count from the date of such order.

Mitter, J.—THE principal ground taken in special appeal is that the Lower Appellate Court has erred in law in admitting the plaintiff's application for review without sufficient reasons. The plaintiff's suit was decreed by the Moonsiff. The defendant appealed, and the District Judge, on 24th September 1872, confirmed the decree, but in the judgment made some observations adverse to the plaintiff's case in respect of a portion of the claim. Some difficulties having arisen in the execution of the decree on account of these observations, the plaintiff, after the lapse of ninety days, made an application to the Judge for reviewing his judgment, and that application has been allowed. It has been urged in special appeal that the District Judge is wrong in admitting this application after ninety days without sufficient reasons. We think that this contention is not tenable. The decree of the Lower Appellate Court having been in favor of the plaintiff, it was not necessary for him, under Section 376 of the Civil Procedure Code, to apply for a review of judgment. This necessity arose when, in the course of the execution proceedings, the District Judge

Digitized by Google

held that by his judgment he did not mean to uphold the Moonsiff's decree in its entirety. This was an order which was in the nature of an amendment of the decree passed in plaintiff's favor, and the plaintiff was entitled to count the ninety days from that date. This ground of special appeal must therefore fail.

It has been urged in the next place that the Lower Appellate Court having found that the plaintiff had failed to prove the particular date of dispossession mentioned in his plaint, should have dismissed his suit for possession. The District Judge observes that he would not be justified "in deciding "on appeal that the adjudication on merits "made by the Lower Court should be set "aside, merely because plaintiff's plaint is in "some respects unproved and probably false, "although true in other ways." We think that the Judge has taken a correct view of the law. Failure of a plaintiff to prove the particular date of dispossession mentioned in the plaint would not be fatal to his claim if it be otherwise established.

The special appeal is dismissed with costs.

The 5th April 1875.

Present:

The Hon'ble A. G. Macpherson, *Officiating Chief Justice*, and the Hon'ble G. G. Morris, *Judge*.

Act VIII of 1859 *s.* 270—*Suit by Attaching Creditor.*

Cases Nos. 1164 and 1165 of 1874.

Special Appeals from a decision passed by the Judge of Mymensingh, dated the 5th March 1874, *affirming a decree of the Subordinate Judge of that district, dated the* 18*th June* 1873.

Brojokanth Chuckerbutty and another (Plaintiffs) *Appellants*,

versus

Banee Madhub Dischit and others (Defendants) *Respondents*.

Baboo Nullit Chunder Sein for Appellants.

Baboo Hem Chunder Banerjee for Respondents.

Where an attaching creditor, dissatisfied with the share allotted to him on a distribution of sale proceeds under Act VIII of 1859 s. 270, brings a suit against the other attaching creditors, and claims to have made the first attachment, he is bound to include as defendants all who have shared in the distribution.

Macpherson, C.J.—THE question in this appeal is as to the distribution of money paid into Court upon the sale of property attached by several judgment-creditors holding different decrees. The plaintiff says that, as regards the defendants, he was the prior attaching creditor, and that he ought to have been paid in full rather than the defendants, who were so paid.

It appears that there were several different decrees and attachments thereunder, and that one Judoo Nath, who is not a party to this suit, was considered to be the first attaching creditor, and was paid in full, and then that the defendants were also paid in full, while the residue was distributed rateably between the plaintiff and certain other attaching creditors. The plaintiff, admitting that Judoo Nath has been treated as the first attaching creditor and has been paid in full, denies that he in fact was the first attaching creditor. He says that he himself (the plaintiff) was the first attaching creditor, and ought alone to have been paid in full. But the plaintiff has chosen to bring this suit against the defendants only without making Judoo Nath a party. It seems to us that this suit cannot properly lie against the defendants alone. As under Section 270 the first attaching creditor alone is paid in full, while the balance is distributed rateably amongst all other attaching creditors, it is clear that justice cannot be done between these parties unless we have before us not only the present defendants but Judoo Nath and all other persons who have been paid by the Court. If Judoo Nath or the defendants were wrongly paid in full, we cannot restore the parties to their true position without having them all before us and ascertaining who really was the first attaching creditor, and then redistributing the fund strictly as directed by Section 270. This we cannot do without having all the parties interested before us. The suit is clearly defective in a most substantial and material respect: and the plaintiff cannot have what he asks for in this suit. We dismiss the appeal with costs.

The Special Appeal No. 1165 of 1874 is in a suit brought by another of the attaching creditors, who is dissatisfied with the share allotted to him on the distribution under Section 270. This suit is also defective as regards parties, and cannot lie in the form in which it has been brought. For substantially the same reasons as those given in dismissing the appeal No. 1164, we dismiss this appeal also, with costs.

Digitized by Google

The 6th April 1875.

Present :

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Rent Suit--Intervenors—Issues.

Case No. 730 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 31*st December* 1873, *reversing a decree of the Moonsiff of that district, dated the* 19*th January* 1872.

Dinonath Bose and another (Intervenors) *Appellants,*

versus

Girish Chunder Bundopadhya and another (Plaintiffs) *Respondents.*

Baboos Mohince Mohun Roy and *Busunt Coomar Bose* for Appellants.

Baboos Kali Mohun Dass and *Doorga Mohun Dass* for Respondents.

In a suit to recover rent by the auction-purchasers of a talook sold for arrears of revenue, where the defendants pleaded that they held the land under the howladars and had confessed judgment in a former suit for rent by those howladars, the latter put in a petition of intervention :

HELD that the Lower Appellate Court had no right to go into the question of the validity of the howla as the issue was who had been in receipt of rent from the ryots?

Kemp, J.—DINONATH BOSE and others, intervenors, in the Court below, are the appellants in this case. Girish Chunder Bundopadhya and others sued Himmut Khan for recovery of arrears of rent. The issue in the first Court was, are the plaintiffs entitled to recover rent from the defendants by suing them, and is it proved that the defendants have paid in 8 annas rent to the plaintiffs on the "poonnya" day or the day on which the tenants make the first payment of their rent to the landlord? The plaintiffs Girish Chunder Bundopadhya and others alleged that they had purchased the talook at a sale for arrears of revenue. The defendants, the ryots, in their written statement, state that they held the land under the howladars, the name of the howla being Rajkishore Bose, that they have nothing whatever to do with the talook purchased at auction by the plaintiffs, and that the plaintiffs have brought this false suit with a view to take khas possession of these lands by ignoring the howla tenure. They further state that, in a former suit brought by the howladar for rent, they have confessed judgment, and the howladars have obtained a decree. A petition of intervention was filed by the howladars before the Moonsiff, but no opportunity appears to have been afforded to them to prove their title in the howla. The Moonsiff being satisfied that the howladar was in the actual receipt of the rent from the ryots, held that it was unnecessary in this suit, which was a simple suit for rent, to go into the question whether the howla of the intervenor was a valid one or not. The Subordinate Judge, without allowing the howladars to adduce any evidence whatever in support of their howla title, held that this howla has not existed from the time of the permanent settlement; and that as the parent estate or talook has been sold by auction for arrears of revenue, the howladaree right has become necessarily extinct (these are the words used by the Subordinate Judge), and consequently the plaintiffs have acquired the right to realize the rent from the ryots of the howla. There is no adjudication on the main point in issue between the parties, namely, who has been in receipt of the rent. It is true that the Subordinate Judge in the last few lines of his judgment observes that there is no contention about the rent, and it is in evidence that the plaintiffs have received a sum of 8 annas out of the rent. Now the plaintiffs examined three witnesses to prove this payment of 8 annas of rent by the defendants on the "poonnya" day, but these witnesses were not believed by the Moonsiff who tried the case in the first instance, and the Subordinate Judge's judgment is clearly based upon the question whether the howla is a valid one or not, a question which he had no right to go into at all inasmuch as the issue was who had been in receipt of the rent from the ryots, and further the question of the validity of the howla could not be entered into without allowing the intervenors an opportunity to adduce proof in support of their howla title. The decision of the Subordinate Judge has placed the ryots in this position that the howladars have obtained against them two decrees for rent, which have been confirmed by this Court in two other special appeals, and the Subordinate Judge has now given a decree to the talookdar against the same ryot and (although we are not quite certain about this) apparently for the same period. So that the ryots have three decrees against them, two by the Moonsiff in favor of the howladars, which have been upheld by this Court, and one by

Digitized by Google

the Subordinate Judge in favor of the talookdar.

We, therefore, reverse the decision of the Subordinate Judge, and restore that of the Moonsiff with costs.

The 7th April 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Regulation VII of 1822 *s.* 9—*Jummabundee—Costs of Collection—Act VIII (B.C.) of* 1869 *s.* 102.

Case No. 1731 of 1874.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 2*nd April* 1874, *reversing a decision of the Additional Moonsiff of that district, dated the* 19*th January* 1874.

Messrs. R. Watson and Co. (Plaintiffs) *Appellants,*

versus

Mohendro Nath Paul (Defendant) *Respondent.*

Mr. R. T. Allan and *Baboo Bhowanee Churn Dutt* for Appellants.

Baboo Rash Beharee Ghose for Respondent.

Where tenants, who were aymadars, voluntarily signed a jummabundee drawn up under Regulation VII of 1822 s. 9, specifying the amounts of rent payable by them to the Government farmers with whom the settlement was made, HELD that the tenants were not entitled to a deduction from such specified rents on account of costs of collection.

A suit for rent under Rs. 100 is not taken out of the purview of Act VIII (B.C.) of 1869 s. 102, by the fact of the rate of rent having been varied by the decision of the Court unless the Judge determined "the right to vary the rent."

Glover, J.—THIS was a suit for arrears of rent. The plaintiffs are the Government farmers, and on the settlement being made under Regulation VII of 1822, a jummabundee was drawn up under Section 9 of the Regulation specifying the amounts of rent payable by the tenants. This document was signed by them, and on it the plaintiffs base their claim.

The gist of the defence in this, as well as in a number of analogous suits, is, that the tenants, being aymadars, were declared by the Deputy Collector making the settlement to be entitled to a deduction of the costs of collection, and were not liable for the gross amount of rent mentioned in the jummabundee.

Both Courts below have allowed the deduction, and the plaintiffs appeal specially.

They urge that the defendants having voluntarily signed the jummabundee are bound to pay the amount of rent mentioned therein, and that it was no part of the conditions under which the jummabundee was executed that the ryots should receive anything for costs of collection.

It seems to me that the plaintiffs were entitled to a decree. It is admitted that the defendant voluntarily signed the jummabundee (which was drawn up before the Deputy Collector recorded his proceeding), and there is no evidence whatever that he did so under a mistaken notion as to the nature of the contract he was making, and this would settle the question of amount of rent in the terms of Section 9. The Judge says that a deduction for collection expenses was part of the jummabundee, but this is not so. The paper has been read to us and contains no such stipulation. What the Judge probably meant was, that the opinion of the Deputy Collector, who made the settlement, was in favor of the aymadars getting an allowance for collection expenses, and that the defendant imagined that under the settlement as afterwards made with the plaintiffs, he would have a similar advantage. The Deputy Collector, I may remark, was in favor of a settlement with the tenants direct, and as the defendant is an aymadar holding a considerable breadth of land, he would have had under such settlement a claim to a deduction for the expense of collecting rent from his under-tenants; but we must in this case look, not to the opinion of the Deputy Collector, but to the settlement as it was actually made, and that settlement was not with the aymadars but with the plaintiffs.

The contract between these two was the jummabundee, and unless it can be shown

Digitized by Google

that there was an agreement between the parties that the tenants should have a deduction from the amount of rent entered in the jummabundee on account of collection expenses, the plaintiffs, it seems to me, have an undoubted right to demand the full rent specified in the contract.

The defendant urges that the settlement made with the plaintiffs was set aside by the Board of Revenue. Were this so, of course the plaintiffs could not recover under such settlement, but the letter of the Board (which is on the record) shows that, although the settlement was not considered to be a satisfactory one, the Board refused to interfere with it, until the end of the year 1280, which includes the time for which the plaintiffs are now suing.

There is no evidence to show that the defendant, who was before holding at a lower rent, was induced to sign the jummabundee and to agree to pay enhanced rates on an implied promise that the recommendations of the Deputy Collector should be carried out and collection expenses allowed. Nor speaking for myself can I see how it was possible for the defendant to be so misled. Any how there has been no attempt to prove any such stipulation or arrangement, and the jummabundee, which is the sole evidence of the contract entered into between the parties, gives the plaintiffs the amount of rent which they claim. I think that they are entitled to a decree, and that the appeal should be allowed with costs.

Special Appeals Nos. 1758, 1759, 1829, 1740, 1741, 1742, and 1743 are analogous cases, and with the consent of all parties will be decided on the principle referred to in No. 1731, the Judge's order being reversed with costs.

In No. 1760 there is no special appeal allowed by law, the suit being one for rent under Rs. 100, and coming, therefore, under Section 102 Act VIII (B.C.) of 1869. It has been urged that the case is taken out of the purview of the Section by the fact that the rate of rent has been varied by the decision of the Court below, but the Section requires more than this, and we must be shown that the Judge determined "the right to vary the rent." It is clear from the record that this was not done, and this special appeal must, therefore, be disallowed with costs.

Mitter, J.—I concur.

The 7th April 1875.

Present:

The Hon'ble W. Markby, *Judge.*

Declaratory Decree—Title.

Case No. 1833 of 1874.

Special Appeal from a decision passed by the 1st Subordinate Judge of Chittagong, dated the 15th May 1874, *reversing a decision of the Sudder Moonsiff of that district, dated the 4th March* 1872.

Goluck Chunder Sircar and another (Defendants) *Appellants,*

versus

Ishan Chunder Deb (Plaintiff) *Respondent.*

Baboo Aukhil Chunder Sen for Appellants.

Baboo Jadub Chunder Seal for Respondent.

A previous ruling (12 W. R., 248) was explained not to mean that a plaintiff must either get the thing he claims, or nothing at all; but that having come into Court upon one title, which he asks to have declared and fails to prove, a plaintiff cannot claim the declaration of another.

It seems to me that in this case this Court ought not to interfere in special appeal. There is no doubt that, as the suit was originally framed, the plaintiff did seem to claim a particular portion of land, and the decree which he has ultimately got, is not a decree for a particular portion of land, but for a 2-anna share.

The defendant, relying upon certain words in a judgment of mine, reported in the 12th volume of the Weekly Reporter, p. 248, contends that, on that ground, this decree ought to be set aside. The words there used are:—"When the plaintiff in a suit asks for "one thing, the Court ought not to give her "a decree, because she proves that she is "entitled to another." Now, if those words are understood to mean that in every suit the plaintiff must either get the very identical thing which he claims or nothing at all, the proposition would be erroneous; and it was under the supposition that something of that kind was laid down by that decision that that very decision has been dissented from by another Bench. But in fact if that case be looked at, no proposition of that kind was intended to be laid down. There the plaintiff was in possession; her possession had not been disturbed. She only said that her title had been denied. And she came into Court alleging a title, and asking the Court to

Digitized by Google

declare that title, which title she absolutely failed to prove. And it was upon that that the observation was made that having come into Court upon one title which she asked to have declared, and failed to prove, she could not claim the declaration of another. That case has no bearing upon the question now before us. In this case it has now been finally settled that the plaintiff's lessor is entitled to a 2-anna share in this property. There is also no dispute that that 2-anna share has been leased to the plaintiff. It seems to me therefore that the Court was justified in giving a decree to the plaintiff, and that it is not a case in which I ought to interfere in special appeal.

The special appeal is dismissed with costs.

The 8th April 1875.

Present:

The Hon'ble A. G. Macpherson, *Officiating Chief Justice*, and the Hon'ble E. G. Birch, *Judge.*

Reviews—Act VIII of 1859 *ss.* 376 *&* 378—*Special Appeal.*

Case No. 1863 of 1874.

Special Appeal from a decision passed by the 2nd Subordinate Judge of Moorshedabad, dated the 1st June 1874 *affirming a decree of the Moonsiff of Jungeepore, dated the 6th January* 1873.

Roy Meghraj Bahadoor (one of the Defendants) *Appellant,*

versus

Beejoy Gobind Burral and others (Plaintiffs) *Respondents.*

Baboo Rash Beharee Ghose for Appellant.

Baboo Mohinee Mohun Roy for Respondents.

A review should be granted only on the discovery of new evidence, or for the correction of some evident (that is, patent and indubitable) error or omission, or some other particular ground of the like description.

The parties in a special appeal are entitled to show that there has been an error or defect in procedure in the granting of a review, which has affected the decision of the case on the merits, by producing a different decision from that come to in the first instance.

Macpherson, C.J.—In this case it appears that upon the 15th of September 1873, Baboo Nuffer Chunder Bhut, the officiating Additional Subordinate Judge of Moorshedabad, sitting as a Court of appeal, reversed the decision of the Moonsiff of Jungeepore. On the 30th of May and 1st of June 1874, Baboo Nuffer Chunder Bhut having ceased to hold the office of Additional Subordinate Judge of Moorshedabad, Baboo Nobo Kumar Banerjee, the Second Subordinate Judge of that district, admitted a review of the judgment of Baboo Nuffer Chunder Bhut, and reversing his decision, restored and confirmed the decree of the Moonsiff of Jungeepore. It is objected in special appeal that Baboo Nobo Kumar Banerjee had no power to review the judgment of Baboo Nuffer Chunder Bhut; that no sufficient reason was shown for his reviewing it; and that his proceedings ought to be set aside. For the respondent it is contended that whether the review was rightly or wrongly admitted, the matter is not one which can be questioned in special appeal.

It appears from the judgment of Baboo Nobo Kumar Banerjee that he admitted the review, not upon the ground of the discovery of any new matter or evidence which was not within the knowledge of the party applying for review at the time of the original hearing, nor in order to correct any patent error or omission, nor for any other particular defect in the judgment of Baboo Nuffer Chunder Bhut. He granted the review upon the general ground that having gone into the case in all its details, he came to a conclusion on the facts different from that at which Baboo Nuffer Chunder Bhut had arrived.

There is no doubt that it is an eminently unsatisfactory and inconvenient state of things if one Judge succeeding to the office of another is at liberty to review and re-hear all the cases decided by his predecessor, and to dispose of them afresh according to the view which he may happen to take of each. It would be almost equally inconvenient that a Judge should be bound, or should be permitted, perpetually to re-hear the cases which he has himself decided, upon every occasion that a party who is dissatisfied with a decision which has been passed chooses to ask him to go again through the evidence upon which he has already decided.

But the law, though providing for a review of judgment in certain special cases, does not, under color of a review, authorize a re-hearing for the purpose merely of seeing whether the Judge on going again through the case will arrive at a different conclusion. When a case is re-heard, the Court goes through the evidence, and decides afresh upon it. But a review can be given only for certain particular reasons; and it cannot be

Digitized by Google

given merely for the purpose of allowing the parties to re-argue the case upon the evidence upon the chance of eventually throwing doubt on the soundness of the decision already passed. As Sir Barnes Peacock says in the course of his judgment in the Full Bench case of Nussurooddeen Khan (5 W. R., p. 96) :—"I have on more than one occasion "observed that no attempt was made to "obtain a review of judgment upon the "ground that, upon the first hearing, the "Court had determined the facts contrary to "the weight of evidence. This is matter "for appeal, not for a review."

The Sections of the Civil Procedure Code which deal with this subject are no doubt very loosely framed. Under Section 376, the ground upon which a review may be granted is stated to be the discovery of new matter or evidence which was not within the knowledge of the party applying for the review, or which could not be adduced by him at the time when such decree was passed, or any other good and sufficient reason. In Section 378 the grounds indicated are the correction of an "evident error or omission," or its being otherwise requisite for the ends of justice. These Sections show that the intention of the Legislature was that a review should be granted only on the discovery of new evidence or for the correction of some patent error or omission, or for some such cause. For example, if a deed is dated a hundred years ago, and the Judge accidentally misreading it thinks it is dated only twenty years ago, and decides the case accordingly,—or if the Judge erroneously supposes that the witnesses all stated that the plaintiff lived at A and decides the case accordingly, whereas the witnesses all stated that he lived at Z and not at A,—in such cases and in any other in which there has been a clear and evident slip or error on the part of the Judge, a review may rightly be admitted. In short, the object of a review is, either to admit new evidence, or to enable the Judge to rectify any patent error (whether of fact or of law) into which he finds he has fallen.

Sections 376 and 378 give no authority to a Judge, on an application for a review, to re-hear the whole case upon the evidence, merely because one of the parties is dissatisfied with his original decision. It is true that in Section 376 there is a general provision that a review may be applied for by any one who from the discovery of new evidence "or from any other good and sufficient reason may be desirous of obtaining a review,"—and that Section 378 says a rewiew may be granted if it is "necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice." But it is a well-known rule that in interpreting Acts of the Legislature, general words are controlled and restricted by particular words. And we are of opinion that the general words used in these two Sections are controlled and restricted by the particular words, and that it is only the discovery of new evidence or the correction of an evident (*i.e.*, patent and indubitable) error or omission, or some other particular ground of the like description which justifies the granting a review. In the present case, none of the grounds specified existed, nor did any ground of the like description.

But it is contended that by Section 378, the order, whether for granting or rejecting an application for review, is final. This question, however, has practically been disposed of by the recent decision of a Full Bench in the case of Bhyrub Chunder Surmah Chowdhry (20 W. R., p. 84). The Court there held that the parties in a special appeal, are entitled to show that there has been an error or defect in procedure in the granting of the review, which has affected the decision of the case on the merits by producing a different decision from that which has in the first instance been come to.

As in that case it appeared to the learned Judges that no ground had been shown on which a review could legally be granted, so we are of opinion that in this case no ground is shown upon which a review could legally be granted.

The Judge who granted the review simply went in detail through the evidence which had previously been gone through in detail by his predecessor, differing from him apparently on every point. This was on the 30th May, when the case was in fact decided on the occasion of granting the review. The case came on formally for re-hearing, two days later, *i.e.*, on the 1st of June, when the Subordinate Judge gave judgment as follows :—"The respondents applied for a "review of judgment, and their application "was granted on the 30th of May. A copy "of the reasons given there is put up with "this record, and in reliance on the said "reasons I confirm the judgment of the "Court of first instance."

Nothing can be more unsatisfactory than the manner in which this case has been dealt with. If such proceedings are legal, a suit may go on for ever. In the present instance, supposing it had so happened that Baboo

Digitized by Google

Nobo Kumar Banerjee had been transferred to another district shortly after the 30th of June 1874, and that Baboo Nuffer Chunder Bhut had returned to his former office, as a matter of course Baboo Nuffer Chunder Bhut would have been asked to review the judgment of Baboo Nobo Kumar Banerjee. And so it might have been had a stranger succeeded him.

The decisions of a Judge are entitled to be treated with respect, at any rate by his successors in office who are his co-equals in judicial position. And Baboo Nobo Kumar Banerjee forgot this rule and acted improperly when, in admitting the review, he made the general condemnatory remarks which he makes on the judgment of his predecessor.

The appeal is allowed: the order granting the review, and the decree on the re-hearing, are set aside: and the decree of Baboo Nuffur Chunder Bhut is restored. The appellant is entitled to his costs in this Court and in the Lower Courts also.

The 9th April 1875.

Present:

The Hon'ble A. G. Macpherson *Officiating Chief Justice*, and the Hon'ble G. G. Morris, *Judge.*

Ejectment—Tenants-at-will—Notice to quit.

Appeal under Section XV of the Letters Patent against the decision of the Hon'ble E. G. Birch, one of the Judges of this Court, dated the 28th January 1875, *in Special Appeal No.* 1252 *of* 1874, *from a decision passed by the Judge of Hooghly, dated the 25th March* 1874, *affirming a decision of the Moonsiff of Oolooberiah, dated the 19th December* 1873.

Hem Chunder Ghose (Plaintiff) *Appellant,*

versus

Radha Pershad Paleet (Defendant) *Respondent.*

Baboo Umbika Churn Bose for Appellant.

Baboo Kumla Kant Sen for Respondent.

The "reasonable notice to quit" which a ryot without a right of occupancy may claim from his landlord before he can be ejected, need not be confined to a demand of possession and notice to quit on a certain day. It is sufficient if the landlord asks for a higher rate of rent and gives the ryot notice to quit if he declines to pay it.

A suit for ejectment against a tenant-at-will is a sufficient demand of possession and would justify a decree containing a date fixed for ejectment.

Macpherson, C.J.—THIS was a suit to eject a ryot on the ground that he had no right of occupancy, and that having been served with a notice to pay rent at an enhanced rate or in default to quit the land, he had refused to do either.

The Court of first instance found that the defendant had no right of occupancy, and that he had been served with the notice as alleged; but it refused to eject him because it "was not aware of any law which provides that the zemindar can arbitrarily eject a ryot simply because he has no right of occupancy." On appeal, the Lower Appellate Court, without determining the status of the defendant, affirmed the judgment of the first Court on the ground that the service of the notice was not established, and that "even if proved, the notice with the record, which calls upon defendant to relinquish if he refuses to pay the higher rent, would not in the present suit entitle plaintiff to enter because he does not make this the ground for ejecting defendant." Mr. Justice Birch, before whom the case came in special appeal, was of opinion that the finding of the Lower Appellate Court in regard to the non-service of notice was sufficient to bar interference on his part, and that it was too late then to take the objection that in such a case as this no notice was necessary.

It has been pressed in argument before us that, inasmuch as defendant was a ryot not having a right of occupancy, there was no need to serve a formal notice of ejectment upon him; and that as this suit was instituted so long ago as September 1873, the suit itself constitutes a sufficient demand for possession, and reasonable time has been given to defendant to quit the land.

In support of this contention, the ruling of the High Court in the case of Mahomed Rasid Khan Chowdhry *v.* Jadoo Mirdha (XX Weekly Reporter, p. 401) is referred to.

A Full Bench of this Court has determined (X Weekly Reporter, p. 33) that a landlord cannot eject a ryot whom he has acknowledged as a tenant, but who has not a right of occupancy, without serving him with a reasonable notice to quit. Sir Barnes Peacock, whose judgment was concurred in by the other Judges, says:—"A ryot, who

Digitized by Google

"has held without any period for the dura-"tion of his tenancy having been fixed, "although he may not have gained a right "of occupancy, cannot have his holding "determined without a reasonable notice to "quit; and a notice given in the last month "of a current year would not be sufficient." In our opinion a notice such as is contemplated in the passage just quoted, need not necessarily be confined to a simple demand of possession and notice to quit on a certain day. It is sufficient if the landlord asks for a higher rate of rent and gives the ryot notice to quit if he declines to pay it. On this point the ruling of the Division Bench in the case of Janoo Mundur *v.* Brijo Singh (XXII Weekly Reporter, p. 548) is applicable. "Under Section 8 Act VIII (B.C.) "of 1869, the right of the plaintiff is to "make his own terms with the defendant or "to turn the defendant out of occupation "of the land. He could do this by serving "him with a reasonable notice requiring "him to quit his occupation at the end of "the year unless he agreed to pay thencefor-"ward the rates of rent mentioned in the "notice." And again, it has been held by another Division Bench of this Court in Mahomed Rasid Khan Chowdhry *v.* Jadoo Mirdha (XX Weekly Reporter, p. 401) that a suit for ejectment brought by a landlord against one who was a mere tenant-at-will (who was found to have no right of occupancy, and who had unsuccessfully pleaded that he held under an "amulnamah" from the zemindar's agent) is in itself a sufficient demand of possession, and would justify the Court in giving the plaintiff a decree, care being taken to fix a date in the decree for ejecting the defendant which would, under the circumstances, be fair and reasonable so far as he was concerned. In the case before us, the precise position of the defendant has not been ascertained by the Lower Appellate Court, which dealt only with the two questions, *viz.*, whether the notice alleged, was in fact given, and, whether if given it was a sufficient notice to quit. The case must therefore be remanded to the Lower Appellate Court in order that the defendant's rights may be adjudicated upon. If his position is such as to fall within the principle of the case of Mahomed Rasid Khan (to which we have already referred) then, treating the institution of the suit as a sufficient demand for possession, the Court ought to give a decree in favor of the plaintiff, fixing a date for giving up possession which shall be fair towards the defendant. If on the other hand the Court finds the principle of that case does not apply, then it will deal with the suit as one in which it has been found that the tenant defendant has not been served with a notice to quit.

As the matter at present stands, the Lower Appellate Court (the Judge of Hooghly) has really decided nothing that is material, save that no notice was ever served on the defendant. The defendant is entitled to a decision as to what is the precise nature of his tenure: and without a decision as to that, his right to resist the plaintiff's claim in this suit cannot be determined.

Costs will follow the result.

The 13th April 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Execution—Mesne Profits.

Case No. 25 of 1875.

Miscellaneous Appeal from an order passed by the Subordinate Judge of East Burdwan, dated the 18th December 1874.

Ununt Ram Hazrah and another (Decree-holders) *Appellants,*

versus

Kuralee Pershad Mistree (Judgment-debtor) and the Bengal Coal Company Limited (Surety) *Respondents.*

Baboos Unnoda Pershad Banerjee and *Taruck Nath Sen* for Appellants.

Mr. Adkin for Respondents.

Certain decree-holders having been sued successfully for possession by the judgment-debtors in the first Court, appealed to the High Court, who reversed the decision, and whose order was confirmed by the Privy Council. The decree-holders on this applied for execution and for mesne profits for the interval during which they had been kept out of possession:

HELD that they were entitled to what they claimed in execution, without bringing a regular suit, as the effect of the High Court's decree was to replace the parties *in statu quo.*

Glover, J. — THE decree-holders were defendants in a suit brought by the judg-

Digitized by Google

ment-debtors for possession, and lost their case in the first Court. On appeal the Principal Sudder Ameen's order was reversed by the High Court, a decision afterwards confirmed by the Privy Council.

The decree-holders on this applied for execution, and to get wasilat for the interval between the decree of the Principal Sudder Ameen and that of the High Court, during which they had been kept out of possession by the parties bringing the suit.

The Subordinate Judge has refused their application on the ground that the High Court's decision was silent as to wasilat, and because they had power to bring a regular suit for the same.

It appears to us that this decision of the Subordinate Judge was wrong. The effect of the High Court's judgment was to replace the parties in the *status quo ante*, and the reversal of the judgment of the Principal Sudder Ameen restored to the defendants all that they had been deprived of under it.

The point was considered by the Full Bench of this Court in the case of Huro Chunder Roy Chowdhry *v.* Shoorodhunee Debia, 9 Weekly Reporter, p. 402, and although the question was not perhaps distinctly referred to them, all the Judges appear to have concurred in holding that a decree of reversal necessarily carried with it the right to restitution of all that had been taken in the erroneous decree in the same manner as an ordinary decree carried with it a right to have it executed.

This decision was followed in Shib Narain Paharaj *v.* Kishore Narain Paharaj, 10 Weekly Reporter, p. 131, the Judges (Bayley and Glover, JJ.) holding that, under circumstances exactly similar to the present, a regular suit for the wasilat did not lie, and that the question of mesne profits came under Section 11 Act XXIII of 1861.

The case of Huro Monee Chowdhrain *v.* Dhun Monee Chowdhrain, 1 Bengal Law Reports, p. 138,* quoted by the respondent's pleader in support of the Subordinate Judge's decision, is clearly distinguishable from the one above referred to.

We think that the decree-holder was entitled to have the mesne profits awarded to him in execution, and that he was not bound to bring a regular suit for their recovery.

The Subordinate Judge's order is, therefore, reversed with costs.

Vide 10 W. R., Civ. Rul., p. 62.

The 13th April 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Enhancement of Rent – Notice.

Case No. 2033 of 1874.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 13th May 1874, affirming a decision of the Assistant Commissioner of Maunbhoom, dated the 23rd December 1873.

Rajah Nilmonee Singh Deo (Plaintiff) *Appellant,*

versus

Heera Lall Chowdhry (Defendant) *Respondent.*

Baboo Gopee Nath Mookerjee for Appellant.

Baboo Golap Chund Sircar for Respondent.

In a suit for arrears of rent at an enhanced rate, where the question whether notice had been served has been decided against the plaintiff, there is no reason for trying any other issue.

Glover, J.—This was a suit for arrears of rent at enhanced rates after notice. Both the Courts below found that no notice had been served. In special appeal the point taken is that, although notice was not served, still the Courts ought to have considered and decided the question whether or not the rent of the tenure was liable to enhancement. In other words, they ought to have given a declaratory decree in favor of the plaintiff's right to enhance the rent, although he could not recover such rent in this suit in consequence of the notice not having been served.

Now the first point which the Court had to decide in a case of this sort was whether the notice of enhancement had been served or not. That point having been decided against the plaintiff, there was no reason for trying any other issue, and as a matter of fact the Courts below did not try any other issue. We have been referred to the case of Bisso Nath Sircar *v.* Tara Prosunno Mojoomdar and others, XXII Weekly Reporter, p. 482, as an authority for the contention that in a suit for arrears of rent at enhanced rates, when the liability of the tenure to enhancement has been put in issue and fully tried, a decree may be given declaring the tenure liable to enhancement even though service of notice to enhance is

Digitized by Google

not proved. This no doubt is the law as laid down by the judgment of the Privy Council, but it has no connection with the present case, inasmuch as here there has been no question as to the right to enhance tried. This case, moreover, comes from the district of Chota Nagpore, where it was tried under Act X of 1859, and that Act gave no power to the Court to pass a declaratory decree.

The special appeal must be dismissed with costs.

Mitter, J.—I concur.

The 15th April 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Alluvial Land—Limitation.

Case No. 101 of 1874.

Regular Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 14th January 1874.

Gokool Kristo Sen Moonshee (one of the Defendants) *Appellant,*

versus

Mr. M. David (Plaintiff) *Respondent.*

Baboos Mohinee Mohun Roy, Lullit Chunder Sen, and *Okhil Chunder Sen* for Appellant.

Baboo Ram Churn Mitter for Respondent.

In a suit for possession of chur lands as re-formations on the original site of plaintiff's or his vendor's lands, or accretions thereto, where limitation is pleaded by defendant in adverse possession, the onus lies on plaintiff to prove that, before disappearance or diluvion, the land in dispute was in the possession of his vendor.

Mitter, J.—This was a suit for possession of 1,008-16-0-2½ dhoors of chur lands on the allegation that they were partly re-formations on the original site of the land of Mouzah Nilokhee, and partly accretions to the said uslee land. The plaintiff's case is that the lands in this mouzah began to be washed away some time after the thakbust proceedings took place, that they re-appeared in the year 1271 when the Government took possession of them as an island chur; that, on the application of the defendants and other persons, the Government withdrew their claim on the 12th March 1867; that although the plaintiff's vendors were entitled to them, they having attempted to take possession were resisted by the defendants; that he purchased the entire zemindaree to which the Mouzah Nilokhee appertains on the 11th Magh 1279, and that he, therefore, seeks to recover possession of this chur land.

The defendant's statement is to the effect that the plaintiff's claim is barred by limitation; that the chur island in dispute does not appertain to Mouzah Nilokhee belonging to the plaintiff; that in fact there was no such mouzah in existence as Mouzah Nilokhee, and that they have been in possession of these lands as re-formations and contiguous accretions of their Mouzah Bashdebpore.

The Subordinate Judge decreed the plaintiff's claim holding that it had been established by the evidence on the record that the land in dispute was partly re-formation of and partly accretion to the plaintiff's Mouzah Nilokhee. On the question of limitation, the Subordinate Judge was of opinion that the defendants, not having been able to establish an adverse possession for more than 12 years, the plaintiff's suit was not barred by limitation. Against this decision, this appeal has been preferred by the defendant.

We have to consider in this appeal, first, whether the plaintiff's claim is barred by limitation or not. As we are of opinion that the plaintiff's claim must be rejected as barred by limitation, it is not necessary for us to refer to the other questions in the case. According to the plaintiff's allegation, he must prove that the land in dispute before it diluviated or disappeared was in the possession of his vendor. Unless he should prove this fact, his claim would not be saved from the operation of the law of limitation, because, according to his own case the lands re-appeared for the first time in the year 1271, and he has not established that after their re-appearance he or his vendor has been in possession for a single day. That being so, unless he should prove that at the time of the disappearance of the land in dispute he or his vendor was in possession, it could not be said that his cause of action accrued within 12 years from the date of the institution of the suit. If that fact had been proved, no doubt he would have been entitled to say that when the land was under water, his possession over it could not have continued; and that when it re-appeared he having been prevented from taking possession by the defendant, the cause of action for this suit then arose. The Subordinate Judge, we do not think, has taken a correct view of the law upon this point. According to him

Digitized by Google

it was for the defendant to make out that he had acquired a title to the disputed land by adverse possession. This view is contrary to all the decisions of this Court. It was for the plaintiff to remove the statutory bar which had been set up against his claim. In this case, the plaintiff has adduced no evidence in support of the fact that he was in possession of the disputed land at the time when it submerged. Therefore, we must hold that the plaintiff's suit is barred by limitation. This appeal is accordingly decreed, the judgment of the Lower Court reversed, and the plaintiff's suit dismissed with costs in both the Courts.

Glover, J.—I concur.

The 16th April 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Hoondee—Liabilities of Drawers and Acceptors[*]

Case No. 1210 of 1874.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 20th March 1874, *modifying a decision of the 1st Subordinate Judge of that district, dated the 2nd August* 1873.

Abdoor Ruhman and others (Defendants) *Appellants,*

versus

Baboo Gunesh Lall and others (Plaintiffs) *Respondents.*

Mr. Ameer Ali and *Moulvie Serajul Islam* for Appellants.

Mr. C. Gregory and *Baboo Aubinash Chunder Banerjee* for Respondents.

[*] The drawer, acceptor, and intermediate indorsers of a hoondee which is dishonored are all liable to the holder; but their liability is not joint as it arises out of different contracts: and a decree obtained against any one of them without satisfaction, cannot be pleaded as a bar to a suit against any other of them.

Mitter, J.—THE plaint alleges that one Zoraor Khan, ancestor of the defendants, carried on a hide business in the town of Bhaugulpore in partnership with a person of the name of Ameer Khan, who also had another firm carried on in his name alone at Calcutta; that a hoondee for Rs. 2,500 having been drawn by Zoraor Khan and Ameer Khan of Bhaugulpore upon the Calcutta firm of Ameer Khan came into the hands of the plaintiffs by purchase; that the said hoondee was accepted by the firm of Ameer Khan at Calcutta; but, on due date, the amount thereof having not been paid, notice of dishonor was forthwith given to the khottee of Zoraor Khan and Ameer Khan of Bhaugulpore. The plaint further goes on to say, that a suit, under Act V of 1866, was brought by the plaintiffs against Ameer Khan in the Original Side of this Court upon this hoondee, together with other hoondees, which were all payable by Ameer Khan as acceptor to the plaintiffs, and a decree was obtained. That subsequent to this, Ameer Khan having been convicted of a grave criminal offence, all his properties were confiscated by Government, and hence the plaintiffs could not realize the money due to him. Hence this suit has been brought.

The defendants denied the genuineness of the hoondee and raised various other objections of which it is only necessary to notice one, *viz.*, that the plaintiffs having already sued Ameer Khan for Rs. 10,000, *i.e.*, the amount of this hoondee and three others, and having obtained a decree from the Original Side of the High Court, was not entitled to sue again the defendants, the heirs of Zoraor Khan.

The Court of first instance decreed half of the plaintiffs' claim, against which decree both parties appealed, and the District Judge, on appeal, has awarded a full decree in favor of the plaintiffs.

In special appeal by the defendants the first objection that has been urged, is, that the suit is not maintainable, the plaintiffs having obtained a decree upon the same cause of action against Ameer Khan. We do not think that this contention is valid. The former suit was brought against Ameer Khan as the acceptor of the hoondee. As acceptor he was alone liable. Zoraor Khan, ancestor of the defendants, had incurred no liability so far as the contract based upon the acceptance of the hoondee was concerned, and therefore he was not of the joint contractors in the matter of the acceptance of the hoondee. The obligation of Zoraor Khan to pay the amount of this hoondee arises out of a different contract, *viz.*, by his jointly with Ameer Khan drawing it at Bhaugulpore after receiving its value upon the Calcutta firm of Ameer Khan. No suit had been brought upon this latter contract

Digitized by Google

in the Original Side of this Court. It is true that the drawer, acceptor, and intermediate indorsers are all liable to the holder of a dishonored hoondee, but their liability is not joint. A decree obtained against any one of them cannot be pleaded as a bar to the maintenance of a suit against another of them. It is only when a judgment is recovered with satisfaction that the debt is extinguished against all. Therefore the former suit in the Original Side of this Court having been brought against Ameer Khan as acceptor, and Zoroar Khan not being jointly liable with Ameer Khan on account of the acceptance of the hoondee by the latter, a decree obtained in that suit *without* satisfaction cannot be pleaded as a bar to the present action. This objection must therefore be overruled.

The next objection taken in special appeal is that the holders of the hoondee in this case having once elected to proceed against the acceptor are precluded to fall back upon the liability of the drawers; and especially in this case, because the plaintiffs have recovered a portion of the claim from the acceptor for which the suit was brought in the Original Side of the High Court. I am of opinion that this ground of special appeal must also fail. Both the drawer and the acceptor are bound to satisfy the debt under separate contracts. In the absence of any especial circumstance, a decree based upon one of these contracts cannot be a bar to the maintenance of a suit upon the other. As regards the objection that the plaintiffs have recovered a portion of the amount of money for which the suit in the Original Side of the High Court was brought, we cannot give effect to it because it was not urged in the Courts below. It simply rests upon this that from the plaint in the former suit, it appears that the claim was for Rs. 10,000 on account of four hoondees, including the present one. It also appears from an application of execution made in that suit, that the plaintiffs sought to recover seven thousand and odd hundred rupees. It is, therefore, contended that the plaintiffs must have recovered, after the institution of the suit, a portion of the claim. This objection has been for the first time urged in special appeal, and I am of opinion that it ought not to be allowed to be taken. If it had been urged in the Court below, it is possible that the plaintiffs might have shown that in point of fact nothing had been recovered, as, if anything had been recovered, it was on account of the hoondees other than the one in question. It is clear, therefore, that we cannot entertain this objection without directing a fresh enquiry upon the facts connected with it. No reason has been shown why this unusual course should be adopted. The special appeal must therefore be dismissed with costs.

Glover, J.—I concur.

The 16th April 1875.

Present:

The Hon'ble W. Markby and H. B. Lawford, *Judges.*

Decrees Ultra Vires—Special Appeal—Costs.

Case No. 1894 of 1874.

Special Appeal from a decision passed by the Officiating Additional Judge of Furreedpore, dated the 19th May 1874, reversing a decision of the Moonsiff of Muksoodpore, dated the 31st December 1872.

Dhun Monee Chowdhrain and another (Plaintiffs) *Appellants,*

versus

Wooma Churn Roy and others (Defendants) *Respondents.*

Baboo Doorga Mohun Doss for Appellants.

Baboo Kashee Kant Sen for Respondents.

Where the decisions of the Lower Courts were found, in special appeal, to have been without jurisdiction, and the suit to be cognizable by the Small Cause Court, the High Court made an order sending the plaint to the Small Cause Court for trial, upon the appellant (plaintiff) paying within three months all the costs of the litigation.

Markby, J.—We are of opinion that the decision of the District Judge is right, and that this suit being one based upon a contract is cognizable by the Small Cause Court, and that the ordinary Civil Court had not jurisdiction. The observations, therefore, which the District Judge has made as to the validity of this contract, and the evidence that has been brought in support of it, must not be considered in any way binding should this matter be hereafter litigated. This appeal will be dismissed with costs.

The appellant now asks us to make an order sending this plaint to the Small Cause

Digitized by Google

Court for trial. We think this is a reasonable course to take, and, accordingly, upon the appellant paying within three months from this date to the respondent all the costs of this litigation, as directed by the decrees of the Court below, and of this appeal, we will send the plaint in this case to the Court of Small Causes for trial. If within three months these costs are not paid, the suit will stand dismissed. The costs must be paid into the Court of the Moonsiff, who will receive them and certify at once to this Court through the District Court that they have been paid.

The 16th April 1875.

Present :

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Bond—Suit by Benamee Obligor.

Case No. 2626 of 1874.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 10th August 1874, *reversing a decision of the Moonsiff of that district, dated the 28th January* 1874.

Judoo Nath Dey (Defendant) *Appellant,*

versus

Girija Bhoosun Mitter (Plaintiff) *Respondent.*

Baboo Ashootosh Dhur for Appellant.

Baboo Radhika Churn Mitter for Respondent.

In a suit upon a bond where defendant pleads that the bond, though executed in the name of the plaintiff, was really executed in favor of a third party, if it is found that plaintiff is not the real holder of the bond, the suit must be dismissed.

Mitter, J.—We think that this case must be remanded to the Lower Appellate Court. The plaintiff sued to recover a sum of money on a bond alleged to have been executed by the defendant in his favor. The defendant in his written statement asserted that the bond, although executed in the name of the plaintiff Girija Bhoosun Mitter, was really executed in favor of one Troiluckho Mitter ; that there was a simultaneous agreement with the real holder of the bond, namely, Troiluckho Nath Mitter, by which a property was let out in ijarah to Troiluckho Nath Mitter, who, from the rent of that ijarah, had to repay himself the amount of the loan. The Moonsiff fixed two issues, namely, 1st, whether the plaintiff in this case or Troiluckho Nath Mitter was the real holder of the bond ; and secondly, whether the debt under the bond has been discharged. He came to the conclusion upon the first of these issues that the plaintiff Girija Bhoosun was only benameedar, and upon the ground that Troiluckho Nath had not brought this suit, dismissed the plaintiff's claim, holding that in the absence of the real holder of the bond, the suit could not go on. On appeal, the Judge has reversed that decision, holding that the defence made by the defendant is really no answer to the plaintiff's claim. He has also observed in one part of his judgment that, according to a condition in the bond and the ijarah lease, the defendant was bound to see the payments made endorsed on the back of the bond, and as this has admittedly been not done, the plaintiff is entitled to a decree.

We think that the judgment of the District Judge cannot stand. The very first question which he had to determine has been left undecided, namely, whether the plaintiff in this case was the real holder of the bond or not. If, as it has been found by the Moonsiff, he was not, this suit must be dismissed. It appears to us that the District Judge has not decided this question. Therefore the appeal must go back to him for a decision upon this point. But we think it also right to observe that even if it be found that the payments have not been endorsed on the back of the bond, still, if Troiluckho Nath be found to be the real owner of the bond, the omission of Troiluckho Nath after having realized the rents to endorse them on the back of the bond ought not in any way to prejudice the defendant. But we think that if it be found that Troiluckho Nath is the real holder of the bond, it will not be necessary to go into that question, because the plaintiff's suit in that case must be dismissed upon the ground that he has no interest in the bond upon which this suit has been brought. However, if the District Judge on remand come to the conclusion that the real holder of the bond is the plaintiff, even in that case, notwithstanding the stipulation in the bond and the lease adverted to above, we think that the Judge would be bound to examine the evidence that might be offered in support of the allegation that the money borrowed had been repaid. With these observations, we remand the case to the Lower Appellate Court for a fresh decision. Costs will abide the result.

Digitized by Google

The 16th April 1875.

Present :

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

A Suit, when commenced—Rent—Putwaree's Allowances.

Case No. 689 of 1874.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 30th December 1873, *reversing a decision of the Moonsiff of Monghyr, dated the 28th August* 1873.

Mengur Munder (Defendant) *Appellant,*

versus

Baboo Huree Mohun Thakoor (Plaintiff) *Respondent.*

Baboo Taruck Nath Dutt for Appellant.

Mr. M. L. Sandel and *Baboo Hem Chunder Banerjee* for Respondent.

A suit commences when the original plaint is filed, and not when the plaint is returned by the plaintiff after amendment.

A putwaree's wages and allowances are in the nature of illegal cesses, and cannot be recovered in a suit for rent.

Glover, J.—The defendant in this suit deposited what he alleged to be the proper rent due on his holding under the provisions of Section 31 of Act VIII (B.C.) of 1869, and the first objection which is taken in special appeal is against that part of the Judge's order which declares that the suit brought by the landlord for recovery of arrears of rent was within the time allowed by that Section, that is to say, it was brought within six months from the date of service upon him of the notice of the deposit made by the defendant in the Collector's treasury. It appears that notice was given to the plaintiff of this deposit on the 14th January 1873, and this suit was instituted on the 14th July of the same year. The special appellant contends that, as a matter of fact, the suit was not brought on the 14th January, that on that day the plaint was presented, but was returned on the ground that the document was improperly stamped, it having three small stamps instead of one stamp of the full value, and that no certificate of the Collector was produced to show that the smaller stamps were given because one stamp of the full value was not available. It appears to us (following several decisions of this Court) that the Judge's decision is correct. In the case of Grish Chunder Singh *vs.* Pran Kishen Bhuttacharjee, VII Weekly Reporter, page 157, it is laid down that a suit must be considered to have commenced when the original plaint was filed, and not when it was returned after amendment. The same principle is decided in the case of Sham Chand Koondoo *vs.* Kulee Nath Roy, Marshall's Reports, page 336. Again the same ruling is laid down in V Weekly Reporter, page 207, Ram Coomar Shaha and others *vs.* Dwarka Nath Hajra, and the Madras High Court also decided this point in the same way in the case of Ismail Sahib *vs.* Arumuga Chetti and others, Madras High Court Reports, page 427. It seems to us, therefore, that this point has been fully settled by competent authority, and the Judge was right in holding that the plaintiff's suit is not barred by limitation.

Then it is said, in the second place, that the Judge has not decided the defendant's objection as to the rate of rent in this case. The point is not taken in the grounds of special appeal. The fact is this, the Judge, who was trying this and another analogous case together, wrote only one detailed judgment, and referred to the evidence on which both the cases were decided in that judgment, treating the second case as being decided by the judgment given in the first. In consequence of the appellant's objection we have had the deposition of one witness read to us, and find that except in one particular which we will notice hereafter, the evidence given by the plaintiff in this case was legally sufficient to justify the Judge in coming to the conclusion that he did. Moreover in his judgment in this case he distinctly refers to the evidence given, and to the reasons which have been already recorded in the analogous case of Huree Mohun Thakoor *vs.* Ramchurn Doss. It may be said that as both the cases might not have come before this Court together in appeal, it would have been more convenient if separate judgments had been written by the Judge. But it would be altogether useless to remand the case now.

Then with regard to the objection that the Judge was not right in allowing some smaller items, namely, the wages and allowances of putwaree and Rs. 7-15-9 on account of Bhowlee Jumma, we think that putwaree's wages and allowances were not fairly chargeable on the defendant; they are

Digitized by Google

in the nature of illegal cesses, and cannot be recovered in a suit for rent. As to the Bhowlee Jumma no objection to the claim is to be found on the record, and it is impossible to class it as an illegal cess. It is a rent due for the land payable in kind instead of in money, and the Judge was right in allowing this item. There seems to be some mistake with reference to the 7 cottahs of land the rent of which was claimed at the rate of Rs. 4-6, for the evidence given makes the rent to be Rs. 3-12 only, and the defendant is entitled to a deduction to this amount. There are besides two other items, sidha or daily allowance rupee 1-4, and wages of Pasbans rupee 1-6-3, which cannot properly come under the designation of rent, and these should also be deducted from the amount of the decree which has been given to the plaintiff. With these modifications the special appeal must be dismissed, and as the special appellant failed altogether in the substantial points of his appeal, we think he ought to pay the costs.

Mitter, J.—I concur.

The 16th April 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Right of Occupancy—Onus Probandi.

Case No. 2733 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Purneah, dated the 25th June 1873, *affirming a decision of the Moonsiff of Kishengunge, dated the 30th June* 1871.

Shaik Keramoollah and another (two of the Defendants) *Appellants,*

versus

Serajul Huq and others (Plaintiffs) *Respondents.*

Mr. Ameer Ali and *Moulvie Murhumut Hossein* for Appellants.

Baboo Grish Chunder Ghose for Respondents.

Before a tenant can oust a landlord by insisting on remaining on his land, he must show that he has acquired by law some right to do so.

Glover, J.—This case was remanded by a Division Bench of this Court, in order that the Judge might consider on the evide it stood upon the Moonsiff's record, w the defendant had proved his right o pancy. The Judge seems to have somewhat beyond the remand orde considered that certain other eviden necessary, and accordingly directe Moonsiff to examine witnesses, and to s case back along with that evidence fo decision. And the Judge has now fo the whole case that the defendant has to prove his right of occupancy.

The ground taken in special appeal the onus was not upon the defendant; for the plaintiff first to make out his and that as the defendant has at all shown that, for a considerable time been in possession, the plaintiff's suit to have been dismissed. It seems to u in a case like this, the onus is alt upon the defendant. The landlord doubtedly the proprietor of the estat before a tenant can oust him by insist remaining on his land, without his c he must show that he had acquired some right to do so. That right was by the rent-law, Act VIII (B. C.) of and under that law the onus is clea the tenant to prove that he had acqu right of occupancy in the land by a years' possession. It is said that the Durkhast which has been filed by the tiff contains a number of words which that the plaintiff's allegation as defendant's lease being for a short pe not true, and that the word "sabeck" former time) shows that the defenda been in possession for much longer tin the plaintiff allows. In the first pl seems to us rather a vague way of out twelve years' possession by referr the word "sabeck." And there can presumption in a case of this sort. years' possession must be proved a presumed; but supposing for the s argument that the plaintiff was not correct in stating the time during whi defendant had been in possession of t that would not in any way shift the of proof. The plaintiff is still the ow the property, and if the defendant wi keep that property out of the hands landlord, the onus is clearly upon hi defendant, to prove that he has acquir right to do so. And as a matter of fa Judge has found that he has been un discharge that onus.

The special appeal is dismissed with

Digitized by Google

The 13th March 1875.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Privy Council Decree—Mesne Profits—Interest.

Case No. 209 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Patna, dated the 13th April 1874.

Mussamut Bibee Budlun (Decree-holder) *Appellant,*

versus

Syud Fuzloor Ruhman (Judgment-debtor) *Respondent.*

Mr. M. L. Sandel for Appellant.

Moonshee Mahomed Yusoof for Respondent.

Where the Privy Council made an order in favor of a plaintiff, decreeing possession of certain property with mesne profits, HELD that the intention was to award such a sum as would compensate the plaintiff for his actual loss, and the decree therefore authorized the Courts of this country to consider and deal with the question of mesne profits as fully as a Court could, which was charged with the duty of originally determining the merits of such a question between the parties to the suit. The High Court accordingly awarded the amount of actual loss found to have been incurred in respect of each year with interest thereon from each year to the date of the High Court's order.

Phear, J.—THE question between the parties in this case has been considered as a question whether interest should be allowed upon the wasilat which was the subject of a certain decree. It has arisen in a somewhat peculiar way, and it will be necessary as a preliminary to explaining our view of the case to recount with some little detail the proceedings which have taken place since the decree was passed. This occurred on the 8th March 1861 when the plaintiff obtained a decree for possession of certain property and mesne profits. On the 25th November 1863 on appeal to this Court, that original decree was altered by limiting the plaintiff's right to a life-interest, but in other respects the decree of the Court below was affirmed.

On the 1st April of the following year, 1864, the plaintiff applied for the execution of the order as to wasilat. On the 8th July 1865, the Ameen's report was made by which the mesne profits were assessed on the property, which was the subject of suit by direct reference to its constituent mehals specifically, for three years from 1266 to 1268 both inclusive.

On the 27th March 1866, the judgment-debtor, after stating that some money had been paid on account of the principal sum of wasilat, and that he was willing to pay the remainder, complained that in the account prepared in the sherishta, interest on the wasilat had been charged for every year preceding the date of ascertainment, as well as subsequent thereto; but that according to rule, it ought to have been only for the subsequent period, and the judgment-debtor ought to have a set-off of the interest on the monies which had been already deposited by him.

On the 29th March, the Judge made his order upon this application of the judgment-debtor, allowing the latter part of his claim by directing that "the payments on account "must of course be written off the debt from "date of payment"—and refusing the other part with this explanation that the assessment of wasilat was confined to the ascertainment of the bare annual amounts of rent which had been lost by the plaintiff, and did not contain the ingredient of interest as it ought to have done up to the date of ascertainment. And on the same day an account was prepared on this footing and initiated by the Judge.

On the 27th September 1866, the judgment-debtor appealed to the High Court against this decision of the Judge relative to interest. But this appeal was dismissed. However, nothing very practical resulted at this stage, because the execution proceedings were not continued beyond this point, there having been an appeal preferred to the Privy Council against the decree in the suit. The High Court made an order in the usual alternative for the giving of security in the event of the execution being proceeded with; and as the security was not furnished, practically execution proceedings were stayed.

On the 22nd April 1872 the Privy Council made their order upon the appeal. It was in favor of the plaintiff absolutely for all the property claimed except two mouzahs with mesne profits. The suit, however, was

Digitized by Google

dismissed as to these two mouzahs. There was a further order that the costs of the Courts in India were to be in proportion to the success of the parties, and that there should be no costs in the Privy Council.

In March of the following year, the plaintiff applied to the Court below for execution of this order of the Privy Council as to mesne profits in respect of the property for which she had succeeded, and to her application a detailed account was appended.

Two petitions, one on the 17th April, and the other on the 29th April, were presented by the defendants objecting to this application of the judgment-creditor—in particular, they objected that so much of the principal sum assessed by the Ameen as related to lands which the Privy Council gives to the plaintiff has been overpaid by the defendant Fuzloor Ruhman, and his step-mother, and that secondly, no interest has been given by the decree of the Privy Council. In May 1873, the plaintiff was heard upon this matter, and the Judge eventually overruled the judgment-debtor's objections, except that made with regard to the interest, and he ordered execution to issue on the footing of the office account,—as to the interest however he gave effect to the objection.

It is now objected on appeal by the plaintiff, judgment-creditor, that the office account is not correct, and that the Judge neglected to consider the plaintiff's objection to it. Also that interest on wasilat ought not to have been disallowed. And again that the Judge was wrong in not giving the plaintiff the costs of his application for execution. As has been already mentioned, the important question before us is, whether the wasilat for which execution should issue, ought to be confined to the bare amount of rents and profits which the Ameen found the plaintiff had been deprived of in the specified years with reference to the specified property, or whether this amount ought not to be increased by the addition of interest in respect of each year's loss from the time when the loss first accrued up to the time of realization.

A good deal of the argument which was directed to us, we may say on both sides, was founded on the supposition that the Court's authority to inquire into and assess the wasilat was that which had been reserved to it by the original decree, and was limited in fact by Section 11 Act XXIII of 1861, as interpreted by some decisions of this Court. In other words, that in the matter of this wasilat, the Judge of the Court below was only exercising f of a Court charged with the executi decree already made, and therefore co go into any substantial merits of the of wasilat as between the parties.

We think that this supposition is ous. The plaintiff has a right to h order of the Privy Council which w in his favor on the 22nd April 1872, into effect. That order in substance the Courts in India to give the possession of a certain property with profits. We think that the Privy certainly intended the Courts of award such a sum by way of mesn as would compensate the plaintiff actual loss, and therefore authorized consider and deal with the question profits as fully and completely as could which was charged with the originally determining the merits of question as this between the parties suit. They were left by the order Privy Council in the situation of which had to try a suit *ab initio* f profits. This is not a case such as th which we are generally most famil and in which a competent Court has determined all questions as to between the parties on their merits, ing the particular question of the and has reserved that to be assessed Court which shall be called upon to the decree. In other words, we th after the order of the Privy Cou passed, it devolved upon the local C entertain and determine the que mesne profits as a Court having ful cretion in the matter, and not as having limited discretion with rega The result is, we think, that the j creditor ought to have, by way of for the loss of mesne profits, the which was assessed by the Ameen first instance as the actual loss in re each year and which has never b nuted together with interest there each year, up to the date of mak order at the rate of 6 per cent. per And there should be a further o interest upon the aggregate amoun rate of 6 per cent. per annum from t until the date of realization.

The appellant will have his cos costs of the High Court and of th Court will have to be assessed in pr to the success in the Privy Council.

We allow Rs. 50 for pleader's fee Court.

Digitized by Google

[PRIVY COUNCIL JUDGMENT.]

The 16th April 1875.

Present:

Sir James W. Colvile, Sir Montague E. Smith, and Sir Robert P. Collier.

General Rule as to Findings of Fact—Finding by Civil Court—Rights of Parties.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Koer Poresh Narain Roy

versus

Robert Watson & Co. and others.

As a general rule, an appellant to Her Majesty in Council cannot hope to succeed upon a pure question of fact as to which the decisions of both Courts below are against him.

A finding by a Civil Court must be taken altogether; a party is not entitled to a decree upon one part of it where the decree would be inconsistent with another part of the same finding, unless he can show that such other part is incorrect.

A party, who is not willing to accept a finding in his favor in a suit, is not in a position to ask for a decree based upon it in the appeal, though he ought to have the benefit of it in some future proceeding.

IN the first appeal of Koer Poresh Narain Roy *vs.* Robert Watson & Co., their Lordships think that there is no other course to take than to dismiss the appeal.

The suit was brought to recover some chur land which was alleged to have accreted to five different estates or parcels of estates. As to the three first, Ramkristopore, Jotashahye, and Chuck Futtehpore, it was admitted by Mr. Bell, the learned Counsel for the appellant, that the questions arising with regard to those estates were purely questions of fact, and that the decisions of both Courts below were against him. Therefore he felt that, consistently with the general rules of this Committee, he could not hope to succeed in the appeal as regards those estates.

With respect to the fourth and fifth parcels, namely, the original Nowshurra and the resumed Nowshurra Sooltanpore Futtehpore, he argued that the appeal should be heard, and, if heard, decided in his favor, although there were the judgments of both the Courts against him, upon the ground that the Ameen, who had been directed to make a local inquiry by the first Judge, had reported in favor of the appellant as regarded those estates. But upon investigation it appeared that the materials upon which the Ameen had reported were not in the record, and their Lordships feel that it would be quite impossible to reverse the concurrent judgments of the Courts below upon questions of fact merely on the ground that the Ameen had reported in a different way, when they have not the materials before them upon which the Ameen formed his opinion.

Mr. Bell then contended that as regarded the resumed Nowshurra he was entitled to succeed as to the parcel in front of that resumed Nowshurra, by reason of a special finding of the Judge, Mr. Belli, which finding was as follows:—"There only remains Now-"shurra Sooltanpore Futtehpore, which is a "Government khas mehal, now under re-"settlement. The Watsons admit that the "proprietary right of Poresh Narain in this "has been allowed by the Government "officers to be coincident with his proprietary "title in Pergunnah Lushkurpore, *viz.*, "annas 4-13-1-1, and that the remainder "was farmed by the Government to them. "If, however, it is a khas mehal, the pro-"prietary right in it belongs to no one but "the Government, who may settle it with "the Watsons or with Poresh Narain or "with any one else whom it likes; and the "fact of the last settlement having been "made between the Watsons and Poresh "Narain must be regarded as merely a happy "accident for those parties. I say therefore "with regard to the land opposite to Now-"shurra Sooltanpore Futtehpore the right

* From the judgment of Sir Barnes Peacock, C.J., and Hobhouse, J., dated the 12th February 1868.

Digitized by Google

"to it will appertain to any party with whom "the Government may settle that mehal." Now it is true that the Watsons admit that the proprietary right of Poresh Narain has been allowed by the Government officers to be coincident with his proprietary title to Pergunnah Lushkurpore, which shows that they disclaim any title in themselves; but that is not sufficient to entitle the plaintiff to a decree unless he can show, which he fails to do, that the Judge was wrong in saying that Nowshurra was a Government khas mehal then under re-settlement; the finding must be taken altogether; and apparently the Judge is right in coming to the conclusion that it was a khas mehal in the hands of the Government which had not been re-settled; and if he was right in that, then of course neither the appellant nor any other person until the settlement can be entitled to a decree with regard to the chur land in front of that resumed Nowshurra.

The result is that the appellant has entirely failed in the present appeal, and their Lordships will therefore humbly advise Her Majesty to affirm the judgments of the Courts below and to dismiss the appeal with costs.

The other appeal of Ranee Surrut Soondree against Watson & Co. it is conceded, must follow the same fate, and be dismissed as regards the main part of the claim; but in the course of the argument it was stated by Mr. Bell that the judgment of the High Court had taken no notice of a finding of the Judge upon the remand. It appears that upon the remand there was no second judgment of Mr. Belli, but merely a report by him to the High Court which was to make the decree in the cause; and no doubt Mr. Belli says:—"I find this, that at "the date of the thakbust proceedings, that "the recorded proprietors of Ratapore, as "ascertained from the thakbust map, were "Mohesh Narain Roy, who was represented "as holding 3 annas 10 gundahs; Bhoyrub "Narain Roy, 5 annas 10 gundahs; and "Jogendro Narain Roy's predecessor, Ranee "Soorjyamonee, 7 annas. The representative "of these 7 annas is now the widow of "Jogendro Narain, the Ranee Surrut Soon-"dree, and the remaining shares are held "by the Watsons in farm. Therefore the "lands opposite to Rajapore will fall to the "Watsons and Ranee Surrut Soondree as "joint holders, in the proportion of 9 and "7 annas." It appears that upon the appeal from this judgment objections were made on the part of the present respondents to that finding, which will be fou page 355 of the record in the other The objection is:—"The share of peti "in Rajapore is 12 annas, and the Jud "made a mistake in supposing that an "person could have a share in ex "4 annas." Therefore Watson claim to be entitled to 12 annas in of Rajapore. It appears that the appellant was also dissatisfied wi finding, and her objection takes thi It appears on page 94 of the record appeal:—"That the investigation "Ameen with regard to the question "whether the lands marked being "land, or only original, and the "alluvial, is based upon mere con "also the finding of the Ameen that a "lands belong to Rajapore in Jot "and not to Ramkristopore, is not bo "by the evidence on record." Th the appellant is not disposed to acce finding. Her original plaint put fo claim to a large portion of land as accretions to the estate of Ramkristop she was not willing to accept the fin her favor in respect of Rajapore. circumstance may account for the Hig not having noticed that finding or gi decree based upon it, and they m have felt, inasmuch as there was no c respect of Rajapore in the plaint, was not competent for them to deal in this suit. Their Lordships, th think that although there is a finding, if it be a correct one, the appellant to have the benefit of in some futu ceeding, yet that the appellant is n position to ask for a decree based in the present appeal.

Their Lordships will therefore advise Her Majesty that this appe ought to be dismissed, and with cos they desire that this should be with judice to any claim that the appella have in respect of land accreted to R and therefore they propose to advi Majesty to declare, in the terms whic read by one of their Lordships in the of the argument, that the dismissal appeal shall be without prejudice appellant's right to any portion of t land in dispute, as a shareholder in R and without prejudice to the questio ther she is entitled to a 7-anna s to any, and what, other share in Raja

Digitized by Google

The 20th April 1875.

Present :

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Endowments (Towleutnamahs)—Act XX of 1863—Wuqf—Purdanusheen Ladies.

Regular Appeals from a decision passed by the Judge of Twenty-four Pergunnahs, dated the 21st March 1874.

Case No. 63 of 1874.

Delrus Banoo Begum (Defendant) *Appellant,*

versus

Kazee Abdoor Ruhman and others (Plaintiffs) *Respondents.*

Messrs. J. T. Woodroffe and *Syud Ameer Ali, Moulvee Syud Murhumut Hossein,* and *Baboo Ashootosh Dhur* for Appellant.

The Advocate-General and *Moonshees Mahomed Yusoof* and *Abdool Baree* for Respondents.

Case No. 61 of 1874.

Delrus Banoo Begum (Plaintiff) *Appellant,*

versus

Nowab Syud Asgur Ali Khan and another (Defendants) *Respondents.*

Mr. J. T. Woodroffe and *Baboos Ashootosh Dhur* and *Kumla Kant Sen* for Appellant.

The Advocate-General and *Moonshee Abdool Baree* for Respondents.

Where a Mahomedan widow of the Shiah sect, executed a towleutnamah with a view to perpetuate certain ceremonies in commemoration of her mother's death, involving the recital of prayers in her own Imambara, and the expenses of the first 10 days of the Mohurrum, HELD that the endowment was not of a public character coming under the provisions of Act XX of 1863.

Where a purdanusheen lady makes an appropriation of property, which so far as words go is a wuqf; it still remains to consider whether it was intended by the appropriator to operate as such. Such ladies have a claim to special consideration, particularly where they deny on oath an effectual knowledge of documents which they are said to have made.

Glover, J.—THE plaintiffs in this case sue to have it declared that the defendant Delrus Banoo Begum has committed various acts of waste in her capacity of Mutwallee or superintendent of a wuqf or religious endowment established by her in 1852 : they pray that, in consequence of these acts, she may be removed from her office of Mutwallee, and two of them (the nephews of the defendant Syud Asgur Ali and Syud Ahmed Ali) ask to be appointed Mutwallees in her room.

The suit was brought with the permission of the District Judge under Section 18 Act XX of 1863.

The defendant urged various *in limine* objections, some of which will be hereafter noticed. Her substantial answer to the plaint was that the property was never really appropriated or made wuqf; that the arrangement was nominal only made with a view to certain family necessities and contingencies, and that she never intended to nor did as a matter of fact give up the control of her property; that she has by her acts continued from the date of the towleutnamah shown conclusively that she always considered the property to be her own, and has dealt with it in a way entirely inconsistent with the idea of its being a wuqf.

The Judge held that a valid endowment had been made by the defendant who had failed to prove that in executing the towleutnamah she had been in any way deceived or was ignorant of the effect of her acts. He held also that the defendant had been admittedly guilty of many and continuous acts of waste, and that she was not a fit person to be continued in the office of Mutwallee. After removing Delrus Banoo Begum from the Mutwalleeship, he conferred the appointment on the defendant's nephews Asgur Ali and Ahmed Ali.

There was a cross-suit brought against the plaintiffs by Delrus Banoo Begum for the recovery of certain documents connected with the wuqf, which the Asgur Ali and Ahmed Ali were said to have improperly retained. This suit was dismissed with costs.

Delrus Banoo Begum appeals in both cases, and the first point we have to consider is her objection that this was not a case coming under Act XX of 1863, and that the Judge had no jurisdiction to try it.

Now, Act XX of 1863 was passed, as appears from its preamble, to relieve the Boards of Revenue and local agents of the duties imposed upon them by Regulation XIX of 1810, which Regulation so far as related to endowments for the support of mosques, Hindoo temples, or other religious purposes, was by it repealed.

The endowments, &c., referred to in the Act, Sections 3, 4, 5 are declared to be the same as those to which the Regulation of

Digitized by Google

1810 was applicable, and Section 16 of that Regulation specifies the kind of endowment which should be made subject to its control and supervision. The words of the Section are :—"It is clearly to be understood that the object of the present Regulation is solely to provide for the due appropriation of lands granted for *public purposes*." Was then the towleutnamah executed by Delrus Banoo Begum an appropriation of lands for public purposes so as to bring it within the purview of Act XX of 1863 ?

The Judge says :—"I apprehend that a "private endowment is one in which the "benefits are appropriated wholly or partly "to individuals, as distinguished from the "general Mahomedan public ;" and again (same page 18, Printed Book) :—"The differ- "ence between a private and a public "endowment is explained in Dalrymple *v.* "Khankar Azeezul Islam, S. D. A. for 1858, "p. 586. Now the terms of the towleut- "namah are not uncertain or ambiguous ; "the wuqf constituted thereby fulfils all "the requisite conditions, and the acts of the "defendant in registering the deed, in "obtaining the transfer of names in the "Collector's books, and in managing the "property throughout the intervening 20 "years under the appellation of Mutwallee "sufficiently prove that possession passed "from herself as malik to herself and Jigree "Khanum as Mutwallees. It is clear that a "valid wuqf once completed cannot be "revoked, and it is certainly not open now "to the defendant to say that she misunder- "stood the effect of the words she used, and "the acts by which she consummated the "wuqf. The endowment certainly is a "religious establishment within the meaning "of Act XX of 1863."

We doubt whether Dalrymple *v.* Azeezul Islam lays down any rule or gives any explanation as to the difference between public and private endowments for religious purposes. It rather deals with the difference between a Mutwallee considered merely as a superintendent of a religious establishment, and one who combines both a personal and an official interest in the endowment and where the appropriation has been made partly for religious, and partly for secular, purposes. A public endowment for religious uses is one which distributes its benefits to all men of all classes professing a defined form of religion; a similar endowment for pious and charitable purposes generally would include all members of the community who chose to avail themselves of the means afforded them by the appropriation. Every one have an equal right to participate, a at all times and at all seasons. Now the case here ? The towleutnamah e by the defendant Delrus Banoo Begu the following effect :—

She begins by saying that she c it incumbent on her to continue and tunate the ceremonies for pious uses fatiha, hajria, &c., which she says fixed and settled usage of her family then details the ceremonies, &c., on wh larger part of the income is to be they are the fatihas of Mahomed, the twelve Emams, the expenses of t 10 days of the Mohurrum and of th days, the repairs of the Imambara the tomb by which she means her m tomb. Of the rest of the income par be expended in paying and pension servants of the estate (the property large one, yielding nearly three quarte lac of rupees annually), and part is applied to the Mutwallee's own uses appoints herself and her sister-in-law Khanum joint Mutwallees with power survivor, and makes an agreement f appointment of a superintendent af death.

This document was executed 10th of September 1852, at a time, when Regulation XIX of 1810 was i and, when according to that Regulati superintendence of the endowment public one, would have been vested Board of Revenue and Board of C sioners, who would have been bound order that the endowment was duly priated to the purpose for which it h destined. Now it is not contended case that any such superintendence w exercised by the Boards in questi that they ever interfered in any way w appropriation, and this too when the t namah or endowment deed had been p registered, and application had been to the Collector to substitute the na the Mutwallees in his mutation regis the name of the former proprieto seems clear from this, that the auth did not, at the time when the endo was made, consider that it was of a character, coming under the provisi Regulation XIX. Nor when Act 1863 was passed did the local Gove make any special provision under Sec to 7 as contemplated by Section 3 Act, which it was bound to have do the endowment been one of a public

Digitized by Google

and for public purposes coming under the Regulation of 1810? No transfer was made under Section 4 of Act XX of 1863. In short, the defendant was never interfered with under either Act or Regulation.

Then as to the wording of the towleutnamah itself. It seems to us that there is nothing in it that contemplates an appropriation for the "general benefit," whilst the defendant's object in making it is further explained in her deposition which is on the record. It was to perpetuate certain ceremonies in commemoration of her mother's death, according to the custom of the family which was of the Shiah sect; and in the regular performance of which the defendant, who had married a husband of the Soonee sect, probably saw some future difficulty. The prayers, &c., to be recited were not to be made in any mosque or regular place of worship, but in the defendant's own Imambara (a building admittedly within the precincts of her dwelling-house), and the expenses of the first 10 days of the Mohurrum were matters of an essentially private character. Mahomedans of both Soonee and Shiah sects are in the habit of performing these Mohurrum ceremonies according to their means, and the richer class of them, no doubt, spend large sums in commemoration of the deaths of Hussan and Hossein; but these ceremonies are personal matters only, and the general public have no right to take part in them. An Imambara, moreover, is not a public place of worship as is a mosque or temple, but an apartment in a private house set apart no doubt for the performance of certain Mohurrum ceremonies, but no more open to the general public, than a private oratory in England would be: as a matter of fact strangers are ordinarily excluded from these celebrations. Doles of a particular kind of provision are no doubt distributed at this time to the fukeers and beggars in attendance, but this is a matter of individual charity, there is no general distribution in which all the poor have a claim to shares.

It appears to us after reading the terms of the towleutnamah and considering the evidence which has been adduced as to the way in which its provisions were understood and carried out, that the appropriation by Delrus Banoo Begum was not of a public character, and that Act XX of 1863 does not apply to it. It follows that the Judge has no authority to give the plaintiff leave to sue, and that his decision was *ultra vires*.

This would be sufficient to dispose of the present appeal; but as we have been informed by the respondent's Counsel, that the case will be carried further, it will be as well to give our opinion on the other points which have been argued before us.

And first as to the way in which the suit has been brought. The plaint is on a 10-rupee stamp on the ground that a declaratory decree only is sought; but this is not so. The plaintiffs ask for distinct and important consequential relief. They ask not only that the defendant may be declared to have wasted the endowment and thereby to have betrayed her trust, but also that she may be turned out of her Mutwalleeship, and they, the plaintiffs, be appointed in her room. The plaintiffs say that what they claim does not admit of being properly estimated by a money value, but this is not so. Under the towleutnamah, the Mutwallees were to receive six twenty-eighths of the produce of the estate, a very considerable sum; and the plaintiffs' claim to this suit as an appurtenance to the office of Mutwallee was easily to be estimated in money. We are of opinion that the plaint ought to have been endorsed on a stamp of proper value.

Then as to the plaintiffs' interest, we very much doubt whether they or any one else could have claimed as a matter of right to be present at the Imambara on the occasion of the Mohurrum ceremonies, or to have participated in the charities then disbursed. We consider both to have been of a private character, and that the defendant had the right to forbid, had she been so minded, any one from entering her premises on these occasions. In any case, all the plaintiffs would not have had the right, even if the two nephews as being of the family possessed it.

We now come to the substantial question between the parties, as to whether this appropriation by the defendant Delrus Banoo Begum was a legally constituted wuqf. We agree with the Judge in thinking that, so far as words go, it was a wuqf which would have bound the appropriator, but what we have to consider is whether it was intended by the appropriator Delrus Banoo Begum to operate as such, and whether she knew that by executing the towleutnamah she then and there divested herself of all her proprietary right in her large and valuable estate, and became only a co-superintendent with her sister-in-law with a comparatively small allowance for maintenance.

The Judge holds that the defendant cannot

Digitized by Google

now be allowed to say that she misunderstood the effect of the words she used or of the acts by which she consummated the wuqf, and under ordinary circumstances no doubt a person would be rightly presumed to have known the consequences of his own deliberate act; but in this case the matter is somewhat different. The defendant is a purdanusheen Mahomedan lady, unable to read and write, and generally ignorant as are most of her class. She has been examined, and she swears positively that she did not understand the meaning of the deed which she executed. She admits her wish to keep her estate for the purpose of perpetuating certain ceremonies in memory of her mother and out of the hands of her legal heirs, and that to this end she by the advice of her confidential servant, Ali Jameen, signed a deed which she was told would have that effect. She swears positively that the towleutnamah was only read over to her in Persian, a language which she did not understand, and that she had no idea of divesting herself by it of her proprietary rights. No evidence has been given to rebut this statement. Only one witness to the towleutnamah, Abdool Azeez, (summoned by the plaintiffs), has been examined, and he does not prove that the deed was ever read to the Begum in the Hindustanee language which she understood, or that its purport was explained to her. Her own acts have been from the first absolutely inconsistent with a knowledge that she had divested herself of her rights as proprietor by the towleutnamah. From a time, shortly after its execution, we find her dealing with the property just as if it were still her own: selling, buying, borrowing, granting mowroosee leases, and exercising all the usual rights of ownership and making everything as public as possible by registering the documents affecting these conveyances. We find, moreover, that long after the towleutnamah was executed (namely in 1871), the Collector of the Twenty-four Pergunnahs gave pottahs to Delrus Banoo Begum (and this is a further argument in favor of the property never having been considered an endowment for public purposes under Regulation XIX of 1810), and treated her as the proprietor of her estate. It is, moreover, hardly likely that had Delrus Banoo Begum known what was the real effect of making a wuqf, she would have headed her receipts for rents paid by the ryots with her name as Mutwallee and a description of the estate as a wuqf mehal, and still have gone on disposing of the property at her pleasure, and as if she had made no wuqf at all. From first to last, as it seems to us, her acts denote a person endeavouring to make such an arrangement of her property as would defeat the claims of her heirs, and permit of the estate being retained for particular purposes, but always considering that she still retained the right to do what she pleased with the property so long as she lived.

We think, therefore, that the burthen of proof was shifted, and that the plaintiffs ought to have given some evidence to show that Delrus Banoo Begum understood the true nature of a wuqf appropriation, and that when she executed the towleutnamah she knew that by it she divested herself at once of all her large property. It is clear that she had no professional assistance at the time, Ali Jameen is described as an old and trustworthy servant but not a lawyer, and none of the witnesses examined for the plaintiffs prove that the Begum in creating the wuqf was in any way cognizant of the effect of her act. It has been generally held in this country that purdanusheen ladies have a claim to special consideration, particularly in cases where they deny on oath an effectual knowledge of documents which they are said to have made. And a precedent was quoted to us from 1 Gex McNaghten & Gordon's Equity Cases, 308 (Price's Cases), where, in the case of an illiterate husband making a gift of his whole property to his wife, the writer of the document being the only person present who could write, and he not being a professional man, the Court of Chancery required to be satisfied that the purport of the deed had been properly explained to the husband and that he knew what he was about, and not being so satisfied dismissed the wife's petition.

In this case we have an illiterate and prejudiced woman with no professional assistance executing a deed written in a language which she did not understand, and which as she swears was not explained to her, by which she completely divests herself of the whole of a large property, and then immediately sets to work to do a series of acts which would have the effect of turning her out of the Mutwalleeship she had created for herself, and of throwing her upon the world absolutely penniless. Before we come to such a conclusion, we ought to have very distinct proof that the real purport of the wuqf deed was properly explained to Delrus Banoo Begum and that she knew what she was about, and it is not too much to say that

Digitized by Google

no such proof has been attempted to be given by the plaintiffs.

It does not appear necessary to go further than this. As to the objection raised by the defendant that the wuqf was indefinite and therefore void, we think it enough to say that it in our judgment fully answered all the requirements of the Imameah law, and that if it had been really and knowingly executed, it would have bound Delrus Banoo Begum without the power of revocation.

We think that the appeal must be allowed, and the Judge's decision in favor of the plaintiffs be reversed with costs. With regard to the cross-suit brought by Delrus Banoo Begum, we think that the Judge ought to have given her a decree: at all events ought to have allowed her her costs. She was admittedly the Mutwallee in possession when the documents were taken from her and retained by the plaintiffs; and if the Judge thought that those documents should be retained by the plaintiffs who were by his order appointed Mutwallees, he should still have given the Begum her costs, as the taking and retaining of these documents by the plaintiffs Asgur Ali and Ahmed Ali was a wrong against the Begum and gave her a sufficient cause of action. She must get her costs on this part of the case in all the Courts.

The 20th April 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Commission to examine Witnesses—Special Appeal—Remand.

Case No. 990 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 6th February 1874, *affirming a decision of the Moonsiff of Begooserai, dated the 31st May* 1873.

Jhotee Singh (Defendant) *Appellant,*

versus

Gopal Singh (Plaintiff) *Respondent.*

Baboo Anund Gopal Paleet for Appellant.

Baboo Chunder Madhub Ghose and *Moonshee Mahomed Yusoof* for Respondent.

Where a commission to examine a witness on behalf of defendant had been returned unexecuted, and the defendant's petition to have it sent a second time was refused both by the first Court and the Lower Appellate Court, the High Court in special appeal remanded the case for the issue of the commission holding that the Lower Appellate Court's refusal had been based on insufficient grounds.

Mitter, J.—This case must be remanded to the Court of first instance to allow the defendant an opportunity of examining one of his witnesses, *viz.*, Maidni Pershad. This witness is in Government service, employed as a Deputy Collector in Arrah. A commission was sent to examine him, but it was returned unexecuted, because he had gone on duty to the mofussil and not to be found in the sudder station. The defendant again asked the Moonsiff, by a petition, on the 19th May 1873, that is, after the commission had been returned, to send it back to Arrah, to have the deposition of Maidni Pershad recorded. This was refused, and we think that the Moonsiff was not right in disallowing this application. The defendant complained of this to the Lower Appellate Court, but the Subordinate Judge has overruled this objection. Reading the judgment of the Lower Appellate Court, we think that this objection has been overruled on insufficient grounds. It is not the fault of the defendant that Maidni Pershad has not been examined. The Subordinate Judge does not say that, owing to the laches of the defendant, this witness has not been examined. He seems to be of opinion that Maidni Pershad would not be a material witness in the cause. The question in this case was whether the property which was sold to satisfy a joint decree against one Dhup Narain Singh and the appellant, was the property of Dhup Narain or not. It was alleged that in that decree the witness Maidni Pershad was also a judgment-debtor, and he being thus acquainted with the parties and closely connected with the transaction was in a position to give important evidence with reference to the question at issue, namely, whether the property sold was the property of Dhup Narain or not. We think that the Subordinate Judge is not right in assuming that Maidni Pershad's evidence would not be important in this case. It seems to us, therefore, that the defendant has not been allowed sufficient opportunity to substantiate his defence. We accordingly remand the case to the Moonsiff in order that the case may be disposed of after taking the deposition of Maidni Pershad. Costs will abide the result.

Glover, J.—I concur.

Digitized by Google

The 20th April 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Lease of Rights—Enhancement of Rent—Act X of 1859.

Case No. 1900 of 1874.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 13*th May* 1874, *reversing a decision of the Extra Assistant Commissioner of Manbhoom, dated the* 1*st December* 1873.

Gopal Singh Moorah (Plaintiff) *Appellant,*

versus

Sunkuree Paharin (Defendant) *Respondent.*

Baboo Nil Madhub Sen for Appellant.

Baboo Ashootosh Dhur for Respondent.

Act X of 1859 does not entitle a lessor to raise the rent payable from a lessee on account of a right leased to the latter to collect lac insects from trees growing in former's lands.

Mitter, J.—In this case the plaintiff sued the defendant to raise the rent of the latter. It was alleged that the defendant used to pay Rs. 21 as rent, but that on certain grounds mentioned in a notice of enhancement, the plaintiff was entitled to raise that rent. Before the Lower Appellate Court it was admitted by the pleader for the plaintiff, and that fact is also admitted now before us by the pleader for the respondent that this rent was payable, not on account of any land, but for a right which was leased to him to collect certain lac insects from trees growing in the forest belonging to the plaintiff. This being so, it is clear that it is not a suit to enhance the rent of any land, but to enhance the rent due on account of a lease of a certain right. There is no provision in Act X of 1859 which entitles the plaintiff to raise without the consent of the defendant, the rent due on account of a right like this. We think, therefore, that the Lower Appellate Court has taken a correct view of the law in holding that the present suit under Act X of 1859 is not tenable.

The special appeal is dismissed with costs.

Glover, J.—I concur.

The 22nd April 1875.

Present:

The Hon'ble A. G. Macpherson, *Offi Chief Justice,* and the Hon'b Markby, *Judge.*

Regular Appeals—Paper-book—Cost Translation, &c.

In the matter of

Lalla Bhoop Narain and another (R ents in Regular Appeal No. 198 of *Petitioners,*

versus

Mussamut Nowab Abassee Begum (lant in ditto) *Opposite Party.*

Baboo Amarendro Nath Chatter Petitioners.

No one for Opposite Party.

The petitioner in a regular appeal to the Hi should not be called upon to deposit the costs lating, &c., any papers of which he has not fu list with a view to their inclusion in the pa What papers a party requires or ought to p matter which he or his vakeel must, in the first determine; the Deputy Registrar preparing his and demanding payment according to the req made on him.

Macpherson, C.J.—It appears to the Deputy Registrar has made a mis calling upon the petitioner to depo costs of translating, &c., any pape which the petitioners have not (by in them in a list furnished by them un 3rd of the Rules of the 3rd Septembe given notice of their desire to place t the paper-book. Under these Rules tember 3rd, 1870, the Deputy Regist to furnish an estimate of the cost of ing the papers entered in any lis which a party, appellant or respond furnished him. But it is not for the Registrar to say what papers a p quires or ought to print. That is a which the party or his vakeel must, first instance, determine, the Deputy trar preparing his estimate and de payment according to the requiremen upon him. It is of course at the the party that he allows the appeal t on for hearing with an insufficient book: for by the 12th Rule, no docu

Digitized by Google

deposition of any witness, &c., not contained in the paper-book shall be read at the hearing of the appeal *without the special leave of the Court.* No doubt if the appellant has failed to print, &c., papers which he clearly ought to have printed, the Court hearing the appeal will probably take care that the consequences of the appellant's neglect shall not injuriously affect the interests of the other party. Still in each case, so long as the paper-book does not contain the papers either party wants, it will be at his own risk that he lets the appeal come on for hearing.

It appears to us that the duties of the Deputy Registrar in the matter are purely ministerial: and that all that officer has to do under these rules is to provide for the printing, &c., as per lists furnished by the parties and finally settled as between them.

We do not see that he can make any actual order on their petition. Neither appellants nor respondents appear to be under the rules compellable (before the hearing) to print any papers save such as they choose to include in their lists. The appellant ought of course to put into the paper-book all that is required in order to place fully before the Court both sides of the questions which he wishes to raise in appeal. But if he does not choose to do so, we cannot, before the hearing, force him to do so: and the respondents must either print the papers of the absence of which they complain, or take their chance under the 12th of the Rules of September 3rd, 1870.

The 22nd April 1875.

Present:

The Hon'ble A. G. Macpherson, *Officiating Chief Justice*, and the Hon'ble W. Markby, *Judge.*

Regular Appeals—Paper-books—Estimate for Printing, &c.

In the matter of

Mussamut Bhogobutty Koonwar (Respondent in Regular Appeal No. 232 of 1874) *Petitioner,*

versus

Mussamut Annrajee Koonwar (Appellant in ditto) *Opposite Party.*

Baboo Taruck Nath Sen for Petitioner.

No one for Opposite Party.

If the petitioner in a regular appeal to the High Court does not furnish the Deputy Registrar with a list of papers which he desires to have prepared and placed in the paper-book, that officer ought not to serve him with an estimate of the cost of printing, &c.

Macpherson, C.J.—THE petitioner was the plaintiff in this suit in the Court below, and sued as a pauper. She got a decree against which a regular appeal has been preferred to this Court. The appeal is valued at Rs. 5,000.

The petitioner has been served by the Deputy Registrar with an estimate of the cost of printing, &c., certain papers, which it is assumed, she will require to have in the paper-book when the appeal comes on for hearing.

The petitioner states that she sued as a pauper in the Court below, and that this appeal having been instituted, she is a pauper still, and has no money with which to pay for printing, &c., and she prays for an order that the appeal may be heard (so far as she is concerned) *on the record* and without her having printed, &c., her papers, in the usual manner.

If the petitioner did not furnish the Deputy Registrar with a list of papers which she desired to have prepared and placed in the paper-book, we think that he was wrong in serving her with the estimate. The remarks made by us to-day in the petition of Bhoop Narain and another in Regular Appeal 198 of 1874 apply almost equally in this case. The Rules of the 2nd of September 1872 and 3rd September 1870 do not compel the petitioner to put any papers in the paper-book unless she chooses to do so. But if she does not, she will bring herself under the 12th Rule of September 1870, which says that no deposition, &c., *not contained in the paper-book*, shall be read at the hearing of the appeal, without the special leave of the Court. Probably as the petitioner sued as a pauper in the Court below and was successful, the Court hearing the appeal will give special leave that the depositions, &c., necessary for her case, may be read though not in the paper-book. But that is a matter which must be dealt with by the Court which hears the appeal, and as to which we cannot make any order at present.

Digitized by Google

The 22nd April 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Limitation—Act VIII (B.C.) of 1869 *s.* 27.

Case No. 1018 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 16*th February* 1874, *modifying a decision of the Officiating Additional Moonsiff of Beguserai, dated the* 31*st July* 1873.

Asman Singh and others (1st Party Defendants) *Appellants,*

versus

Shaikh Obeedooddeen (Plaintiff) and others (2nd Party Defendants) *Respondents.*

Baboos Mohesh Chunder Chowdhry and *Nil Madhub Sen* for Appellants.

No one for Respondents.

The limitation of one year prescribed by Act VIII (B.C.) of 1869 s. 27 applies only to suits described in it, and the suits to recover the occupancy of any land, &c., referred to therein, are suits which were cognizable by the Revenue Courts under Act X of 1859 s. 23 cl. 6.

Mitter, J.—For the reasons mentioned in the decision reported in page 53, Weekly Reporter, Volume XXI, we think that the contention raised upon the question of limitation must fail. The limitation of one year prescribed in Section 27 of Act VIII of 1869 applies only to suits described in it, and the suits to recover the occupancy of any land, &c., referred to therein, are suits which were cognizable by the Revenue Courts under Clause 6 Section 23 of Act X of 1859. The effect of the Full Bench decisions reported in page 186 of the 7th Volume, Weekly Reporter, and in page 513 of the 9th Volume, Weekly Reporter, is that only possessory suits in which the sole question to be determined is the right to be restored to possession depending on the legality or otherwise of the act of ouster by the landlord are contemplated by Clause 6 Section 23 of Act X of 1859. The present suit is not of that nature, and consequently is not governed by the law of limitation prescribed in Section 27 of Act VIII of 1869. It has been urged that the Judicial Committee of the Privy Council in a case reported in page 24, Privy Council Ruling, of Weekly Reporter, Volume XIII, has taken a different view of the construction to be put upon Clause 6 Section 23 of Act X of 1859. I do not think that this contention is well-founded, because their Lordships in their judgment observe that "the suit being one between "under-tenants claiming a right to the pos-"session of lands of which they have been "dispossessed, their zemindar who disputes "their right of possession has in their Lord-"ships' judgment been properly brought "under the 6th Clause of the 23rd Section "of Act X of 1859." It appears to me that this observation, far from overruling, very clearly confirms the view taken in the two Full Bench decisions of this Court quoted above. For these reasons we think that the objection of limitation taken in special appeal in this case must be overruled. In the course of the argument the pleader for the special appellant abandoned the other objections mentioned in the petition of special appeal, which is therefore dismissed without costs, no one appearing for the respondent.

Glover, J.—I concur.

The 22nd April 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Mortgage Bond—Money Decree—Execution Sale—Rights of Purchaser.

Case No. 1317 of 1874.

Special Appeal from a decision passed by the Judge of Cuttack, dated the 10*th March* 1874, *affirming a decision of the Moonsiff of Pooree, dated the* 31*st July* 1873.

Aruth Soar (Plaintiff) *Appellant,*

versus

Juggunnath Mohapattur and others (Defendants) *Respondents.*

Baboo Mohindro Lall Mitter for Appellant.

Mr. H. E. Mendes and *Baboo Soorendro Kishen Dutt* for Respondents.

When a creditor who holds a bond whereby property is mortgaged, elects to take a money decree, and in execution thereof brings the mortgaged property to

Digitized by Google

sale, he by that sale transfers to the purchaser the benefit of his own lien and also the right of redemption of his debtor. When, therefore, the decree-holder is himself the auction-purchaser, he obtains the right to have his lien on the mortgaged land satisfied.

Glover, J.—THE plaintiff lent Rs. 250 on a bond to the husband of defendant No. 3, Damoo Panda, and Mukoond Panda, defendant No. 4. This was in August 1865. The bond mortgaged a "pali seba" or turn of worship belonging to the debtor.

On the 3rd November 1868, plaintiff sued defendants 3 and 4 on the bond and got a money decree: he then applied for execution and for the sale of the mortgaged property, whereupon defendant No. 1 filed a petition of objection under Section 246 of the Civil Procedure Code on the ground of purchase previous to the plaintiff's decree. The claim was disallowed, and the debtor's rights in the property sold, plaintiff himself becoming the purchaser for Rs. 220.

Defendant No. 1 then sued to establish his rights as owner by purchase before attachment in execution of plaintiff's decree. The defence was that the purchase was a collusive one in the interests of the mortgagors, and the result that the present defendant No. 1 got a decree and ejected the present plaintiff, who is now suing to establish his lien on the mortgaged property.

The Subordinate Judge, after disposing of several *in limine* objections, decided on the authority of Kureemoonnissa Bibee *v.* Huronnissa Bibee, XV Weekly Reporter, p. 195, that as the plaintiff elected to take a money decree only, and was aware at the time of his purchase in execution of the previous purchase by defendant No. 1, he was not entitled to sue to have his lien declared, or to saddle the property with money due on his decree at the expense of an innocent third party.

It is contended in special appeal that this is an erroneous view of the law, and that in any case the plaintiff is entitled to enforce his lien to the extent of what remains of his claim after giving defendant credit for the amount of his bid at the auction sale.

In the suit brought by Gobind Mohapattur against Aruth Soar to contest the propriety of the decision come to under Section 246 of the Civil Procedure Code, it was held by both Moonsiff and Judge that the way in which Aruth Soar got his decree was extremely suspicious and savoured of collusion. The result was that Aruth's decree was pronounced not *bonâ fide*, and the present defendant (then plaintiff) succeeded. We do not, however, understand the judgment to say that the money was not lent by Aruth, or that the mortgage bond executed in his favor by Damoo Panda was a forgery. The collusion seems to have been between the widow of the debtor Damoo, Mukoond, and Aruth, and this is concluded from the fact that, although Mukoond was not a party to the bond and could not have been sued upon it, he still confessed his liability by an ekrarnamah, and was in consequence made liable under the decree. Of course this finding as to the way in which Aruth managed his suit is final as between him and the present defendant, but the decision did not affect the mortgage bond given to the plaintiff by Damoo, nor was the *bona fides* of the debt to Aruth either considered or decided, and so we come to the general question as to what are the rights of a purchaser at auction of a debtor's interest in a property then under mortgage.

The Full Bench decision in Syud Emam Mumtazooddeen *v.* Raj Coomar Dass, XXIII Weekly Reporter, p. 186, lays down the law differently from the case reported in XV Weekly Reporter, p. 195. It says in effect that when a creditor, who holds a bond whereby property is mortgaged, elects to take a money decree, and in execution thereof brings the mortgaged property to sale, he by that sale transfers to the purchaser the benefit of his own lien and also the right of redemption of his debtor, transfers in a word everything that either mortgagor or mortgagee could convey. When plaintiff, therefore, himself bought at the execution sale the rights and interests of his debtor, he obtained the right to have his lien (if he could prove it) on the mortgaged land satisfied. There is no contest in the present case that the lien did not exist, nor that it was not prior to the defendant's vendor's purchase; it would seem therefore (as we are bound by the Full Bench decision) that Aruth is still entitled to have his debt *plus* interest satisfied by the sale of the mortgaged land, unless the defendant chooses to save his purchase by paying the sum due.

The case must be remanded to the Judge to try the 4th and 6th issues decided by the Moonsiff, namely, the validity of the bond given to the plaintiff and the nature of the defendant's purchase, whether it was at the time burthened with the plaintiff's lien or not.

Costs to follow the result.

Digitized by Google

The 23rd April 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Instalment Bonds—Limitation—Act IX of 1871 *s.* 20.

Reference to the High Court by the Moonsiff of Cutwa, through the Judge of East Burdwan, dated the 2nd April 1875.

Tara Sooduree Kuloonee, *Plaintiff,*

versus

Bhoobun Chunder Ghose, *Defendant.*

An instalment bond is not "a promise or acknowledgment" within the meaning of Act IX of 1871 s. 20; but is complete in itself and does not require any reference to the old bond which it supersedes. It is a new contract with new stipulations and terms, and limitation runs from the due dates therein mentioned.

Case.—I HAVE the honor to forward the accompanying proceedings of a case marginally noted, tried and determined by me under my powers as a Small Cause Court Judge under Section 29 Act VI of 1871, with the request that they may be transmitted to the High Court for an expression of opinion solicited by me on the point referred.

Plaintiff sues the defendant for the recovery of Rs. 20 due upon an instalment bond. The defendant, while pleading non-liability, and denying the execution of the document, contends that it is barred by limitation, on the ground that it purports to have been executed more than three years of the due date of a bond alleged to have been given by him, and that the debts under the two documents are identical.

The execution of the kistbundee defendant has been found as a fact and it is not denied by plaintiff that th under the bond is a part of the s matter of the instalment bond in suit. also apparent that the latter was ex when the debt upon the bond had barred by limitation.

The point upon which the opinion o Lordships is solicited is—

Whether the debt under the inst bond that was covered by the old barred by limitation?

The defendant relies upon the pro of Section 20 Act IX of 1871, and that, as the instalment bond was not ex before "the expiration of the pre period," it does not keep alive the ol due under the bond. Plaintiff conten an instalment bond is not "a promise or a ledgment" within the meaning of th tion, but is essentially a new contra hence, as such, limitation runs as if th no prior bond in existence.

My humble opinion is that the pl contention is correct. Section 20 re cases where the original debt rema tact, and a "promise or acknowledgme respect of it made within the pre period gives the obligee a fresh s point from the date thereof. In fa debt would become irrecoverable aft expiration of the prescribed time, b the acknowledgment or promise. E instalment bond is something differen a mere "promise or acknowledgmen is complete in itself and does not any reference to the old bond it supe whereas "acknowledgment or pr carry along with them the idea of pa which are inseparably linked to it. instalment bond is, as I take it, a new c altogether with new stipulations and consequently limitation runs from t dates therein mentioned, irrespective time specified in the discarded docume

I have given plaintiff a decree cont upon their Lordships approving the of the case I have taken.

The judgment of the High Cour delivered as follows by—

Glover, J.—We are of opinion th Moonsiff is right, and that the decree he has passed (conditionally) in favor plaintiff should be affirmed.

Digitized by Google

The 23rd April 1875.

Present :

The Hon'ble E. G. Birch and G. G. Morris, *Judges.*

Appeal to England—Costs.

Case No. 1 of 1875.

Miscellaneous Appeal from an order passed by the Judge of Chittagong, dated the 28th September 1874.

Asgur Ali and others (Judgment-debtors) *Appellants,*

versus

Nugendro Chunder Ghose and another (Decree-holders) *Respondents.*

Baboo Sreenath Doss for Appellants.

Baboos Mohesh Chunder Chowdhry and *Mohinee Mohun Roy* for Respondents.

When the Privy Council decrees not only a certain specified sum as the costs of the appeal to England; but also awards the costs incurred in the Courts in India, the decree-holder is entitled to the costs for translating the record of the appeal and for transmitting it to England.

Birch, J.—THIS is an appeal against the order of the District Judge of Chittagong, allowing execution to be taken out in his Court for the sum of Rs. 3,021-1-9, the costs for translating in this Court the record of the appeal to the Privy Council and for transmitting it to England.

It is contended here that the decree-holder is not entitled to those costs inasmuch as they are not costs incurred for the purposes of the appeal to this Court, nor are they included in the decree of Her Majesty in Council.

It is clear that this point has been several times before the High Court when as here the Privy Council not only decrees a certain specified sum as the costs of the appeal to the Privy Council but also awards the costs incurred in the Courts in India. From the rulings in the cases which have been referred to, namely, the case reported in 15 Weekly Reporter, p. 356, 18 Weekly Reporter, p. 89, 21 Weekly Reporter, p. 411, and another case, to the paper-book of which our attention has been drawn, Miscellaneous Appeal No. 85 of 1873, we think that the Judge was right in allowing the execution to proceed for those costs.

We dismiss the appeal with costs allowing one gold-mohur for pleader's fees.

The 24th March 1875.

Present :

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Arrears of Rent—Interest—Act VIII (B.C.) of 1869 *s.* 21.

Case No. 36 of 1874.

Regular Appeal from a decision passed by the Subordinate Judge of Patna, dated the 29th November 1873.

Mussamut Bibee Fuseebun (Plaintiff) *Appellant,*

versus

Mussamut Ashrufoonnissa *alias* Amanee and others (Defendants) *Respondents.*

Mr. M. L. Sandel for Appellant.

Moonshee Mahomed Yusoof for Respondents.

In suits for arrears of rent, a Court of justice is not bound in every instance to award interest at 12 per cent. the rate specified in Act VIII (B.C.) of 1869 s. 21, but has discretion either to disallow interest altogether, or to reduce the rate according to the circumstances of each case.

Where a plaintiff sought to recover more than what was actually due, and it did not appear that defendant would have refused payment if the sum actually due had been demanded, the Court reduced the rate of interest to 6 per cent.

Mitter, J.—THIS was a suit brought by the plaintiff to recover from the defendant Rs. 6,226-13-6 principal and interest on account of arrears of rent due from the year 1278 to 1280, under a farming lease dated the 27th June 1870. The defendant does not deny the genuineness of the lease. The only question that has been raised in the defence is that the amount claimed is not the correct amount due, *i.e.*, that the plaintiff should have deducted several items, the details of which are given in the written statement, from the amount claimed in the plaint. The defendant also objects to the plaintiff's claim for interest, alleging that he is not bound under the lease

Digitized by Google

to pay the same. It was also urged that a portion of the land leased was not in the possession of the defendant, and that therefore a proportionate deduction should have been made by the plaintiff on account of the land of which possession has not been received by the defendant. The Subordinate Judge, with reference to this last objection, has decided that the defendant has failed to make it out. The pleader for the respondent before us attempted to object to this finding under Section 348 of the Civil Procedure Code; but as he was not ready with the stamp duty required to be paid under the law to entitle him to raise this objection, we decline to enter into it. Therefore, so far as the decision of the Lower Court on this point is concerned, it must be upheld.

With reference to the question of interest, the Subordinate Judge has decided it against the plaintiff. He says in his judgment:—"Under the terms of the kubooleut on which "the plaintiff sues interest can only be "charged when three successive instalments "are left unpaid, and it is evident from the "accounts filed with the plaint that there "has been no such default on the part of the "defendant. I am of opinion that the plain-"tiff is not entitled to any interest before the "date of the suit." This decision appears to me to be not correct. It is true that one portion of the kubooleut provides that, upon the happening of a particular contingency, the defendant would be liable to pay interest of three successive instalments that would remain unpaid. But there is no provision in the lease that in any other case no interest should be charged at all. Section 21 of Act VIII (B.C.) of 1869 says:—"Any instal-"ment of rent which is not paid on or before "the day when the same is payable, accord-"ing to the pottah or engagement, or if "there be no written specification of the "time of payment, at or before the time "when such instalment is payable according "to established usage, shall be held to be an "arrear of rent under this Act, and, unless "otherwise provided by written agreement, "shall be liable to interest at 12 per cent. "per annum." Therefore all that we have to determine in this case is whether in the lease itself there is a distinct provision that the lessee is not liable to pay interest upon the instalments due. The passage in the lease referred to by the Subordinate Judge runs thus:—"I will pay to the aforesaid "proprietress the said fixed rent year by "year, season by season, and instalment by "instalment, without setting up any plea of "diluvion, drought, fall of hail, injury done "by worms and other earthly and heavenly "calamities. I shall not default to pay "any instalment." Then follows that special provision to which I have referred. It is quite clear that in the lease itself there is no provision that, in case any instalment of rent be not paid, the tenant would not be liable to pay interest on account of that instalment. Under the law, Section 21, which I have quoted, it is clear that, unless there is such an express stipulation, the instalment of rent which has fallen due shall be liable to interest at 12 per cent. per annum. It appears to us, therefore, that the Subordinate Judge has not considered this question with reference to the provisions of Section 21 Act VIII (B.C.) of 1869. Under that Section it has been held that a Court of justice is not bound in every case to award interest at the rate of 12 per cent., and that it is in the discretion of the Court either to disallow interest altogether, or to reduce the rate of interest according to the circumstances of each case. Looking to the special circumstances of this case, we find that the plaintiff sought to recover an amount which was not actually due, and remembering the fact that there is nothing on the record to show that, if the amount really due had been demanded that the defendant would have in that case also refused to pay the same, we think we ought to reduce the rate of interest mentioned in Section 21 to 6 per cent. per annum.

The other objections that have been raised against the judgment of the Subordinate Judge are briefly these:—That the Subordinate Judge ought not to have allowed a deduction of an item of Rs. 26 on account of the value of certain articles furnished by the defendant to the plaintiff, and that another item of Rs. 150, which has not been credited by the plaintiff on account of rent, should not have been allowed to the defendant. These objections rest on the credibility or otherwise of the evidence adduced, and after perusing that evidence, we think that the Subordinate Judge has come to a right conclusion.

For these reasons we modify the decree of the Lower Court only to the extent mentioned above, *i.e.*, we allow to the plaintiff interest at the rate of 6 per cent. per annum. In all other respects that decree will be confirmed. Each party will pay his own costs of this appeal.

Glover, J.—I concur.

Digitized by Google

The 26th April 1875.

Present:

The Hon'ble W. F. McDonell, *Judge.*

Rent Suit—Rate fixed under Act VI (B.C.) of 1862 *s.* 10.

Case No. 1276 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Furreedpore, dated the 10*th March* 1874, *reversing a decision of the Moonsiff of Bhanga, dated the* 14*th August* 1873.

Dwarkanath Bose and others (Plaintiffs) *Appellants,*

versus

Ram Lochun Bose and another (Defendants) *Respondents.*

Baboo Rajendro Nath Bose for Appellants.

Baboo Umbika Churn Banerjee for Respondents.

In a suit for rent, where the claim was at the rate fixed by the Revenue Officer acting under Act VI (B.C.) of 1862 s. 10, and was dismissed on the ground that that officer had not the power to assess such rent as he thought proper, HELD that the plaintiff, whose claim was not in the alternative, was not entitled to a decree at the rate previously paid.

I SEE no reason for interfering with the decision of the Subordinate Judge. The rulings relied upon by him are certainly applicable to the present case.

It is argued that even if it be held that the Revenue Officer had not the power under Section 10 of Act VI (B.C.) of 1862 to assess upon the land such rent as he thought proper, and that the Lower Appellate Court was right therefore in reversing the Moonsiff's order giving a decree at that rate, still that as the defendant was admittedly in occupation of the land, the plaintiff was entitled to a decree for whatever rent was previously paid and might be found to be due. The Full Bench Ruling of the 24th January 1874 (Weekly Reporter, Volume XXI, page 208) was cited in support of this argument. But in the first place the appellant is not entitled to urge this point now in that it is not one of the grounds taken in the written grounds of special appeal; and in the next, the claim in the present case was not in the alternative: the claim was clearly for the rent at the rate fixed by the Revenue Officer, and not for the rent at the rate previously paid; and as a matter of fact no evidence has been given which would show what was the rent previously paid, nor was this point alluded to in the Moonsiff's judgment; and that it was one not easy to discover may be inferred from the fact that the Revenue Officer when acting under Section 10 of Act VI (B.C.) of 1862 assessed the defendant at what he considered was the prevailing rate instead of ascertaining what was the rent actually heretofore paid by him. Holding, therefore, that the Subordinate Judge was right in dismissing the plaintiff's claim *in toto*, the appeal is dismissed with costs.

The 26th April 1875.

Present:

The Hon'ble E. G. Birch and W. F. McDonell, *Judges.*

Kistbundee—Petition—Evidence.

Case No. 2002 of 1874.

Special Appeal from a decision passed by the Judge of Jessore, dated the 18*th May* 1874, *affirming a decision of the Subordinate Judge of that district, dated the* 9*th January* 1874.

Pearee Mohun Mitter (Plaintiff) *Appellant,*

versus

Mohendro Narain Singh and others (Defendants) *Respondents.*

Baboo Rash Beharee Ghose for Appellant.

Messrs. J. S. Rochfort and *J. Younan* for Respondents.

A petition put into Court by a judgment-debtor, for time to pay the instalments due under a kistbundee, may be considered as evidence of a new contract formally entered into with the decree-holder and declared in Court.

Birch, J.—WE think that the Lower Courts are right in holding that the plaintiff is barred by limitation from enforcing the kistbundee dated 12th Bysack 1272. But we consider that they have put too narrow an interpretation on the plaint when they say that the new agreement entered into between

Digitized by Google

the plaintiff and his judgment-debtors is not the cause of action set forth in the plaint. The first part of the plaint contains a recital of what had passed antecedent to the petition of the 4th Aghran 1277, and the concluding portion of the plaint runs thus:—"Therefore institution of a fresh suit for "money in the judgment kistbundee and in "the petition, under which time was allowed, "is necessary. The defendants having en-"tered into fresh agreement to pay Rs 334-"10 and extended the time by the aforesaid "petition of 4th Aghran 1277, the period of "limitation has accrued from that time, and "the case is not therefore out of time."

This shows that the plaintiff wanted in this suit to put in issue the validity of the the agreement contained in the petition to the Court, dated 4th Aghran 1277, and that the defendant understood this to be the nature of the plaintiff's claim is seen from the 3rd para of his written statement in which he states:—"The petition for time, "which plaintiff states in the plaint to be "the new contract, and the kistbundee of "1872, not bearing adequate stamps, cannot "be accepted as evidence in the Civil "and plaintiff's suit is not, therefore, m "able." And we are of opinion that fair construction of the plaint he is to have that question tried in this suit

The Judge says that he declines sider such a petition as a new contract there is nothing against its being con as evidence of a new agreement f entered into and declared in Court. is the duty of the Courts to decide suit whether upon such an agreeme plaintiff is entitled to relief or not. has improperly calculated the sum d in the power of the Court to rectify i

In the present stage of the case nounce no opinion on the effect of the ment; there has been no trial of thi We confine ourselves to directing the of first instance to try the question whether upon the evidence of an agr contained in the petition the plaintiff any, and if so what, relief. The case back for trial on this point, with le either party to produce any evidenc may think fit. Costs to abide the res

Digitized by Google

CRIMINAL RULINGS.

The 18th September 1874.

Present :

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Bond—Good Behaviour—Security—Breach of the Peace—Act X of 1872 s. 509 and Sch. II, Form E.

(Miscellaneous case.)

Bindessuree Pershad and others, *Petitioners,*

versus

Gujadhur Pershad, *Opposite Party.*

Messrs. J. H. A. Branson and *C. Gregory* for the Petitioners.

Messrs. G. H. P. Evans and *R. T. Allan* and *Baboo Hurihur Nath* for the Opposite party.

Where a person who had been required to give a bond to keep the peace in the Form E to Sch. 2 of the Code of Criminal Procedure, instead of giving such bond, signed a security bond in the Form G under Section 509 of that Code for good behaviour, it was held that the latter did not constitute a binding obligation.

Phear, J.—We think that the order of the 20th April which directed that the recognizances of Bindessuree Pershad should be forfeited must be set aside, because it appears here that the recognizance bond entered into by him was not valid and of binding force. The original order directing Bindessuree Pershad to enter into recognizances to keep the peace was made on the 19th February ; and, that, being assumed to be a proper order, well founded and binding upon Bindessuree Pershad, obliged him to enter into a bond such in form as that which is given in the Schedule 2 of the Criminal Procedure Code under the mark E. But no such bond was entered into by Bindessuree Pershad. Probably in consequence of some blunder on the part of the Magistrate's amlah, Bindessuree was, after this order, made to sign a bond in the form G of the same Schedule, that is, a bond for good behaviour which it is competent to the Magistrate to order, under Section 509 of the Criminal Procedure Code, in the event of the facts proved before him being such as to justify such an order. The two bonds are very different indeed in their nature and scope ; and it appears to us that the bond in the form G, entered into or rather signed by Bindessuree Pershad under, and in assumed pursuance of an order which in effect directed that he should sign a bond in the form E, does not constitute a binding obligation. And for this reason, the order of the 20th April which directed his recognizance should be forfeited and that the amount of the said bond should be levied from him, is a bad order and must be set aside.

The order of the 20th May which directed not only Bindessuree Pershad but Umbica Pershad and Mungla Pershad to enter into recognizances, is also we think bad for want of sufficient foundation in the evidence. It is beyond question that there was no evidence before the Magistrate which in any way tended to show that either Umbica Pershad or Mungla Pershad were likely to commit a breach of the peace, or to do any act which might lead to a breach of the peace. There was in truth no evidence before him affecting these persons. And by the express words of Section 493, the Magistrate can only come to his adjudication under that Section upon evidence taken before him. Consequently the adjudication of the Magistrate so far as it affects these two persons is plainly bad for want of evidence.

The case as regards Bindessuree Pershad is perhaps not quite so clear. The Magistrate says : "The fact that the recognizances "of Bindessuree have been forfeited (that "refers to the order of the 20th April which "has just been dealt with), and that his "antagonist Gujadhur is still under recog- "nizances is *primâ facie* enough to show that "it is right to take fresh recognizances from "him, and defendant shows no cause rebut- "ting the presumption against him."

This, as it stands, we need hardly remark,

Digitized by Google

is not a good reason for the Magistrate's adjudication. If the Magistrate had before him evidence from which he could fairly come to the conclusion that the state of things still existed which had legitimately led to the making of the former order for recognizances against Bindessuree, and further that notwithstanding that order, Bindessuree had subsequently to its date and while the recognizances were in force broken the peace, we think there would have been ground upon which the Magistrate might well enough have adjudicated that Bindessuree was likely to commit a breach of the peace. The fact that the man who was bound down to keep the peace deliberately, and notwithstanding this obligation committed a breach of the peace, is of itself unquestionably evidence, for as much as it is worth, that he is likely again to commit a breach of the peace; the other relations between him and his opponents still subsisting. But we find that nothing of this kind has been proved before the Magistrate here: there is in truth on this point scarcely anything more than the passage which has just been read from the Magistrate's judgment. He was the Magistrate who had made the previous order, and probably in writing this passage of his judgment, he was writing from remembrance of that which had previously taken place. It does not appear that there was evidence of this fact formally before the Magistrate which could have been met by the defendants and tested by examination or cross-examination, and so made the proper foundation for the Magistrate's adjudication. We need hardly remark that while, under such circumstances as those just now referred to, an adjudication of forfeiture might be a good reason for taking some steps towards preventing a second breach of the peace, still it would be very unjust that *merely* because the recognizances of the one party had come to an end or ceased to be operative, during the time when the recognizances obligatory upon his opponents subsisted, the former should be made to enter into a fresh recognizance. Each case of this kind must depend upon its own facts; and those facts ought to be distinctly established before the Magistrate by proper and legitimate evidence.

It seems to us, upon the whole, that this has not been done in the case before us even with regard to Bindessuree Pershad, and therefore we quash the order of the 20th May as well in regard to Bindessuree as to the other two persons, Umbica Pershad and Mungla.

The 23rd November 1874.

Present:

The Hon'ble F. B. Kemp and E. G.
Judges.

Jurisdiction—Land Dispute—Civil Court Trespass—Act I of 1871 *s.* 22.

Reference to the High Court under 296 *of the Code of Criminal Pr by the Officiating Magistrate of*

Sheikh Tunnoo, *Petitioner,*

versus

Kureem Buksh, *Opposite Party*

Where there was a dispute as to the ownersh on which the complainant's cattle were fo complainant stating the land belonged to A, him the right to graze his cattle there, and charged (who had seized and impounded th claiming the land as his own, it was held that of the Magistrate referring the parties to the Ci was illegal, and that he should have disposed o himself under the Cattle Trespass Act I of 187

Reference.—A CHARGE of illegal se cattle was brought by a man named T who alleged his cows were grazing on which they had a right to graze be to one Talebar Bepari, when they we gally seized and pounded by the opposit who when summoned answered that t was his, and therefore he pounded the On this, without taking any further ev the Deputy Magistrate dismissed th as being properly suited for a Civil C

I am aware there has been a disp some time about the land in questi both sides claim it, but I think tha the Cattle Trespass Act a Magistr power to decide the question as to w the occupier of the land, and that th the case has been wrongfully dismiss appears that Chapter V of Act I o gives a Magistrate a summary pow enquiring into a case of this kin deciding (without prejudice to any ultimate rights) who is really the occu the land, and that a decision on the m the case should have been arrived at.

Chapter V of the Act has no penal it is compensation that is to be award the granting of the power to award c sation ought to carry with it the po deciding if the grounds on whic compensation is asked are good or not.

Judgment of the High Court.

Kemp, J.—THE Deputy Magistra wrong in referring the complainant

Digitized by Google

case to the Civil Court for redress. The case ought to have been tried under Section 22 Act I of 1871, the Cattle Trespass Act.

The question whether the seizure of the cattle was illegal and whether the petitioner, in consequence of such illegal seizure, is entitled to compensation, will very much depend upon whether the complainant, Sheikh Tunnoo, had a right to graze his cattle upon the land upon which they were seized and taken to the pound by the opposite party Kureem Buksh. We observe this party was summoned by the Deputy Magistrate, but no enquiry such as is contemplated in Section 21 of the Act was made.

The case is returned for trial.

The 23rd November 1874.

Present:

The Hon'ble F. B Kemp and E. G. Birch. *Judges.*

Summary Trial—Procedure—Act XLV of 1860 *ss.* 341, 342, 352, *&* 353.

Reference to the High Court under Section 296 *of the Code of Criminal Procedure by the Sessions Judge of Hooghly.*

The Queen

versus

Banee Madhub Doss and others.

The accused in this case were convicted by the Magistrate summarily of offences under ss. 352 and 341, Penal Code, although it was contended on their behalf that, if guilty, they ought to have been convicted under s. 353, in respect of which a summary trial could not be held. The Sessions Judge, on the Magistrate's own judgment, recommended that the convictions should be set aside on the grounds (1) that the facts showed that the accused should have been convicted under s. 353 or under s. 342, and (2) that the Magistrate had no power to convict of the lesser offence, and so give himself jurisdiction to try the case summarily.

HELD, in concurrence with the Sessions Judge, that the accused ought to have been tried under s. 353: the Magistrate's summary proceedings were accordingly set aside, and a fresh trial directed.

Reference.—UNDER Section 296 of the Code of Criminal Procedure, I have the honor to submit the accompanying case for the orders of the Honorable High Court, as in my opinion the Magistrate of Howrah has convicted the accused on a trial held contrary to law.

The accused have been convicted under Sections 352, 341, Penal Code, in a summary trial, and have been sentenced to six weeks' rigorous imprisonment, which is a sentence from which, if passed in a summary trial, no appeal lies. From the facts found by the Magistrate, it appears to me that they should have been convicted either under Section 353 or under Section 342, Penal Code, in either of which cases a summary trial could not be held and the sentences passed would have been subject to appeals. It is in this that the illegality consists.

The facts are stated at length in the Magistrate's judgment, but it is sufficient, I think, for the purposes of this reference if I quote merely the summing up of the Magistrate, which is to the following effect:—

"The case seems to me a very bad one, and "is not a solitary one; only a month before, "most of the accused, in the house of this "very Banee Madhub Doss, were reported to "have grossly abused the prosecutor for "doing his duty towards one of their num- "ber. Cases in which constables have been "beaten for doing their duty towards Baboos "in liquor are far from infrequent. There "have been cases in which constables have "begged to be excused from taking up "drunken Baboos, so much do they dread "the consequence and the enmity of those "men. A Baboo of good social position, who "is not ashamed to get drunk, finds the "interference of a low born common con- "stable an absolutely intolerable indignity. "His kind sympathizes with him actively. "The presumptuous constable is thrashed, and "becomes a marked man. If he ventures to "complain, he is at once seriously accused "himself and put in no small danger. In "this case the story of the man on the wall "seems wholly unworthy of a moment's "belief. I believe that the accused Baboos "on being ordered by prosecutor to keep "quiet, got so heated with liquor and indig- "nation that they assaulted and beat the "prosecutor and refused to release him when "desired to do so by the head constable, and "that in fear of the consequence of this act "they have trumped up the grave charge "against the constable and have hired a "Barrister and Vakeels to maintain it. I "must protect the constables against treat- "ment of this kind and mean to make a "severe example. To attack and bind a "constable when on duty is a serious matter "for drunken men to be convicted of; to "refuse to release him when called on to "do so by a police officer and to de- "prive him of his uniform is an aggravation. "To follow this up when sober by falsely "charging their victim with feloniously "entering a house is a very heavy aggrava-

Digitized by Google

"tion. In this latter portion Banee Madhub, "Judoonath and Gopal and Khetter Mullick "are apparently alone, and it is these men "who have been most prominent throughout. "I will not give them any option of paying "a fine, but sentence them to six weeks' "rigorous imprisonment under Sections 352 "and 341; awarding no sentence under Sec- "tion 20 of the local Act. The remaining "defendants are fined Rs. 20 each under the "local Act, and Rs. 10 more for the assault.

"I note Mr. Allen's objection that the "accused should be tried only under Section "353 for assaulting a public servant on duty "for discharging his duty. I do not think "so. It is possible that they might be "convicted under that Section, but not unless "they were guilty under Section 352 as "well. I see no reason why the charges of "being drunk and disorderly and of com- "mitting illegal restraint should not be super- "added to a charge under either Sections 352 "or 353 of the Penal Code."

The Honorable High Court will observe that the illegality on which I make this reference was brought to the Magistrate's attention by the Counsel for the accused. It seems beyond dispute that a Magistrate cannot convict of an offence made up of only a portion of the facts which he finds against a prisoner, so as to give himself jurisdiction to convict a prisoner summarily. If he could do so, he could in this manner pass a sentence up to three months' imprisonment for the lesser offence, a sentence which would not be open to appeal; whereas if he convicted an accused properly for an offence made up of all the criminal acts that he had committed, any sentence beyond one month would be appealable. The object of the law is, I submit, to give a Magistrate final jurisdiction in petty cases, and not to give him an extended jurisdiction over any case by allowing him to convict on only a portion of the facts proved, and so to reduce what may be a serious offence to one of its elementary parts. The case reported at 22 W. R., 294, is in point, as the charge in the case under report was apparently made, and the police report submitted it as one under Section 353, Penal Code, but the Magistrate, notwithstanding that he appears to have considered all the facts proved which constituted that offence, convicted on the minor charge under Section 352.

In conclusion I beg to state that pending the orders of the Honorable High Court I have directed the accused to be admitted to bail.

Judgment of the High Court

Kemp, J.—We think, with the Judge, that the accused in this case c have been tried under Section 353 relates to an offence not cognizabl Magistrate summarily under Chapter of the Code of Criminal Procedure proceedings of the Magistrate are se and a fresh trial directed.

The 30th November 1874.

Present:

The Hon'ble F. B. Kemp and E. G. *Judges.*

Queen's Coin—Counterfeit Coin—Fabr (Proof of.)

Reference to the High Court under S 296 of the Code of Criminal Pro by the Sessions Judge of Rajshah

1. Parushullah Mundul

versus

Kheroo Mundul (No. 453).

2. The Queen

versus

Gurib Shek (No. 424).

3. Ram Ruttun Saha

versus

Bawool Mundul (No. 465).

Where the charge is one of counterfeiting coin, direct proof of fabrication is not neces render the person punishable under the sections Penal Code with reference to the uttering of fals All that is required is a guilty knowledge of the ousness of the coin at the time of receiving pos of it, or the absence of such guilty knowledge Such guilty knowledge may be proved either di or indirectly from surrounding circumstances.

Reference—*Case No.* 453.—In thi the accused, having bought some rice plaintiff, tendered in payment an eight piece. The plaintiff thinking it spu refused to take it, whereupon accused ten another coin of the same value ass plaintiff of its genuineness. Plaintiff, ever, considered the second coin as spu as the first, and told accused so, where accused jumped out of the boat and ran a He was pursued and captured, and on searched two other spurious eight anna p were found on his person.

Digitized by Google

The Deputy Magistrate who tried the case—an officer with the powers of a Magistrate of the second class—considered that there was no proof of fabrication of the counterfeit coins by the accused, and convicting him under Section 241 sentenced him to two months' rigorous imprisonment.

Now it appears to me that the Deputy Magistrate is wrong in law in convicting the prisoner under Section 241, and that the sentence awarded is altogether inadequate to the very grave offence of passing counterfeit Queen's coin.

The Deputy Magistrate considers that as there is no direct proof of fabrication of the coins by the accused, he should have the benefit of the doubt and be punishable only under Section 241. Now it is nowhere required that there should be direct proof of fabrication to render a person punishable under the other Sections of the Code with reference to the uttering false coin. All that is required is a guilty knowledge of the spuriousness of the coin at the time of receiving possession of such coin, or the absence of such guilty knowledge at first. In the first case the offence is of course much graver than in the second.

Such guilty knowledge may be proved either directly (which seldom is the case) or indirectly from surrounding circumstances.

In the present case it is clear that the accused was in possession of four counterfeit pieces of Queen's coin; that he attempted to pass one; and on that attempt not succeeding, again made an effort to induce the prosecutor to receive as genuine another spurious coin.

He gives a false account of the manner in which he became possessed of the spurious coins, and it is shown that he used to work as a sonar.

Considering, therefore, his unexplained possession of four spurious coins, his repeated attempts to pass two of the coins, his false statements as to how he came by the coins, and the improbability of him, a sonar, being ignorantly in possession of spurious coin, it appears to me that the Deputy Magistrate was wrong in law in treating the case at all under Section 241, that the offence fell either under Section 240 or 243, and that under such circumstances the Deputy Magistrate had no jurisdiction to try the case at all.

The sentence awarded is, in my opinion, altogether inadequate to such an offence. Tampering with Queen's coin is a most serious offence, and to punish it with two months' rigorous imprisonment is not calculated to deter coiners from committing it. I recommend that the order of the Deputy Magistrate be quashed, and that he be directed to commit the case to the Sessions for trial.

In the second case the accused attempted to pass as genuine two gold mohurs, which cannot of course be called Queen's coin. The accused admitted his possession of the coins, and pleaded having received them from some one else. Of his guilty knowledge of the spuriousness of the coins at the time of passing the money there can be no doubt, as he only asked two rupees for them whereas their proper value was at least 32 rupees. His statement as to the manner in which he became possessed of the coins also, in my opinion, broke down.

I do not, however, recommend that this case should be revived. The proof of guilty knowledge at first is not so clear as in the first case, and I only refer to it as the Deputy Magistrate gives the same reason as in the previous case for considering that he had jurisdiction, *viz.*, want of direct proof of fabrication of the coins. He would, in my opinion, have exercised a sound discretion in committing the case to the Sessions, but under the circumstances I am not prepared to recommend the case being revived.

In the third case I am clearly of opinion that the Deputy Magistrate acted altogether without jurisdiction in convicting under Section 241.

In this case one Bawool Daoi—from his name an old offender—deliberately attempted to pass as gold mohurs 3 rupees which had been gilded. The accused denied the whole transaction—had no defence—but the charge was clearly proved against him. Under such circumstances, it seems to me that the Deputy Magistrate was wrong in law in presuming the absence of guilty knowledge of the spuriousness of the coins at the time of first possession, when the denial of the accused of all share in the transaction and of his possession of the coins at all clearly pointed to guilty knowledge.

This is again a case of tampering with the Queen's coin, and it ought, in my opinion, to have been dealt with under Sections 249, 251 or 253. The sentence passed is also, as in the first case, quite inadequate to the gravity of the offence committed.

I therefore recommend that the order of the Deputy Magistrate be quashed, and that he be directed to commit the case to the sessions.

Digitized by Google

Judgment of the High Court.

Kemp, J.—We think that the Judge's view of the law is correct, but looking to the fact that the sentences have expired we refrain from interfering in these particular cases.

The 27th November 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Jurisdiction—Bench of Magistrates—Lurking House Trespass by Night—House-breaking by Night—Act XLV of 1860 *s.* 457.

Reference to the High Court under Section 296 *of the Code of Criminal Procedure by the Magistrate of Bhaugulpore.*

The Queen

versus

Bachun Kadir.

A Bench of Magistrates has no jurisdiction to try a charge for lurking house trespass by night or house-breaking by night, under s. 457 of the Penal Code.

Reference.—On the 27th January 1874, the prisoner was brought up before the Banka Sub-divisional officer exercising the powers of a Magistrate of the 2nd class, charged under Section 457, Penal Code. The Sub-divisional officer Shah Mahomed Ishaq drew up an order that "as it was necessary to try the case before a Bench of Magistrates, the case be postponed to the 4th February;" on which day the prisoner was again brought up before the Bench possessing powers of a 1st class Magistrate, and a charge having been drawn up under Section 457 of the Penal Code, he was convicted and sentenced to two years' rigorous imprisonment. Against this sentence the prisoner preferred no appeal.

In the first place, a Bench has no power to try a case falling under Section 457 of the Penal Code; in the second place, it will be observed that the trial was not a summary one at all, but the whole case was conducted as a regular trial, the evidence being recorded in full and the charge being drawn up in proper form. The trial consequently is altogether illegal. The guilt of the accused, however, seems to be beyond doubt, and he did not appeal against the sentence.

The prisoner has been in jail since the 2nd February undergoing this sentence, for which I, as District Magistrate, am responsible; and I would explain that the Deputy Magistrate himself brought the case to notice on the 4th March while the Joint Magistrate was in charge at head quarters, I being absent on famine works; that that officer directed the papers to be laid before me and they were sent to me, but were mislaid by me, and the matter escaped my memory in the pressure of other work till the other day.

Judgment of the High Court.

Kemp, J.—The Magistrate ought to have reported this case in February last, instead of in November.

The Bench of Magistrates had no jurisdiction to try the prisoner for an offence under Section 457 of the Indian Penal Code, and although the prisoner has not appealed we cannot pass over the case now it has been brought to our notice.

The prisoner must be tried by a competent Court, and, if convicted, his sentence should be made to date from the 4th of February, the date upon which the sentence of *two* years' rigorous imprisonment was passed by the Bench of Magistrates.

The 5th December 1874.

Present:

The Hon'ble W. Markby and W. F. McDonell, *Judges.*

Contraband Salt—Fine—Act VII (B.C.) of 1864 *s.* 16.

(Miscellaneous Case.)

Kishory Mohun Pramanick and others, *Petitioners.*

Baboo Bhuggobutty Churn Ghose for the Petitioners.

A rowannah as defined by Act VII (B.C.) of *1864* is complete on the face of it without any certificate by way of endorsement signed by the Superintendent showing that the endorsement made by the Preventive officers of Customs has been examined by him.

Section 16 of the Act VII only gives power to fine when the salt is not specified in a rowannah.

Markby, J.—In this case it seems to us that the orders complained of must be set aside. We must assume, of course, now that the facts are correctly found; and according to the facts found a boat containing salt, the owners of which had in their possession a boat-note, but had no rowannah with them at the time, had passed beyond what are called the excepted limits. The salt on board this

Digitized by Google

boat was subject to the regulations laid down in Section 13 and the following Sections of Act VII (B.C.) of 1864, and it was seized by the police officers, and has been confiscated under the provisions of Section 16. That Section provides that "any salt exceeding five seers in quantity, which may be found within such limits as aforesaid (that is, outside the excepted limits) not specified in a rowannah, shall be held to be contraband, and as such shall be seized and confiscated." The question, therefore, is whether this was salt "not specified in a rowannah" within the meaning of this Section. Now the evidence of Sharoda Prosad Chatterjee, the Revenue Officer, is this. He produces a rowannah which there is no dispute has reference to the salt on board this boat, and therefore in that sense the salt no doubt was specified in the document. But the view taken by the Magistrate is that this was not a complete, but only an inchoate rowannah. Now this must be determined by the definition of a rowannah which is given in the Act itself, and that definition is that "the word rowannah shall mean a written or printed permission duly issued under the provisions of this Act to possess or transport salt." The only defect which Sharoda Prosad Chatterjee points out in this rowannah is that it does not bear on the back of it a certificate signed by the Superintendent, showing that the endorsement made by certain Preventive officers of Customs has been examined by him. Now from an inspection of the document it does not appear that that endorsement is any part of the rowannah. The term rowannah, as defined by the Act, is a permission to possess or transport salt, and that permission is complete upon the face of the rowannah without that certificate, and this permission is signed by the Revenue authority. Moreover, Sharoda Prosad Chatterjee says in his evidence that this rowannah was "issued" on the 30th June. He further goes on to say that until the rowannah is returned with the certificate on the back of it, the boat must remain within the excepted limits. Now whether or no he is right in that last statement, is not a matter which we have to consider in this case. What we have to decide is whether this was a case in which the boat and the salt could be confiscated under the provisions of Section 16; and inasmuch as upon the face of the rowannah, it would appear that the document was complete on the 30th June, and as the Revenue Officer who has been called as a witness himself says that it was issued on that day, it seems to us impossible, without any further explanation, to say that this was salt not specified in the rowannah within the meaning of the Act. No one has appeared in this case on behalf of the Custom House authorities or of the Government, or of any other party whatever, to give us any explanation. Therefore, in the absence of any such explanation, we must act upon the case as it appears before us. Acting upon that, it seems to us that we must hold that this salt was specified in the rowannah within the meaning of Section 16, and could not therefore be confiscated under that Section.

The order of confiscation will be quashed, and the boat and the salt, which we understand are still in the possession of the police authority, will be delivered up to the petitioners. It appears that the parties have also under Section 16 been fined Rs. 740. That Section provides that "any person possessing or transporting or attempting to transport such salt shall be liable to a fine" and so forth. It is clear, therefore, that the fine if paid ought to be remitted, because Section 16 only gives power to fine when the salt is such as has been before mentioned, namely, salt not specified in the rowannah. Therefore, for the same reasons as given in the earlier part of this judgment, the fine must be remitted also.

The 8th December 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Contraband Salt—Principal—Agent—Boatmen—Act VII (B.C.) of 1864.

Reference to the High Court under Section 296 *of the Code of Criminal Procedure by the Sessions Judge of Hooghly.*

The Queen

versus

Modun Mohun Pal Chowdhry and others.

The High Court in this case upheld the conviction by the Magistrate under Act VII (B.C.) of 1864 s. 18, both of the owner of contraband salt and of his agent who was transporting the salt, and declined to direct the Magistrate to pass sentence on the manjees of the boat in which the salt was being transported when seized, their boat having been already confiscated by the Magistrate.

Reference.—THE Magistrate of Howrah has convicted the appellants under Section 18

Digitized by Google

of the Salt Act. They are the owner of 500 maunds of salt, his charaunder, and two manjees. The owner Modon Mohun Pal Chowdhry has been sentenced to a fine of 500 rupees, the charander Chaman Teli to a fine of 200 rupees, and the manjees have received no sentence because the Magistrate has considered that the confiscation of the boat "is a sufficient punishment for them."

The salt has also been confiscated.

The rowannah taken out for the salt declares that it is to be taken to Barh "*by the route of river Hooghly and by rail, viâ pass station, Howrah.*" The Bengali version of the rowannah is to the same purport. The evidence for the prosecution is to the effect that the salt was stopped beyond Bally pass station after some pursuit, and that when overtaken the boatmen gave up the rowannah above-mentioned.

The defence is that the words "by rail" were accidentally inserted in the rowannah through the mistake of the dalal; that the boat stopped at Bally pass station and gave up the rowannah, and that the rest of the case for the prosecution is false.

Now, I may first observe that this story for the defence rests entirely on the unsupported statements of the accused and their agent, the dalal, and that it is contradicted by the evidence for the prosecution on which no suspicion is thrown, and further by the rowannah itself. The mention of the Bhagirutty and the Railway both is unusual, but the mention of the pass station as Howrah is to me conclusive that the parties applying for the rowannah signified their intention to convey the salt to Barh by *railway* from Howrah, and not *viâ Bally*, for there is a pass station at the Howrah station expressly for transport of salt by railway, and the pass station at Bally is for salt proceeding by river. If, therefore, the owner or transporter of the salt or any person connected with the salt trade had read this rowannah, he could not have failed to perceive that it was to have been conveyed by railway only, notwithstanding that the Bhagirutty was specified. I can explain the use of the word Bhagirutty only by some intended fraud, and a desire to conceal it and to avoid the consequences; and this appears not only from the ambiguity in the terms of the rowannah, but from the conduct of the agent and boatmen in attempting to "run" the Bally pass station to escape giving up their rowannah, and the inevitable detection.

In this view of the case, I consider that the conviction of the owner of the salt Modon Mohun Pal Chowdhry, and the confiscation of the salt boat, &c., under Section 18 of the salt Act, is correct; but I am of opinion that the agent, the charandar, should not have been convicted as well as the principal, for it is the principal who is constructively held liable by the law through the act of the agent. I, therefore, remit the fine of 200 rupees passed on the charandar Chaman Teli; if it has been paid, it must be refunded.

I observe that Modon Mohun Pal Chowdhry was under Section 151 of the Code of Criminal Procedure allowed to appear and make his defence by an authorized agent. This should have appeared on the face of the examination of the agent, which would have saved this Court much unnecessary labor in wading through the vernacular record to ascertain this point.

I am of opinion that the confiscation of the boat, &c., which is by law imperative is not under the law "sufficient punishment" for the manjees, and that the Magistrate was on conviction bound to pass some sentence on them. The penalty of confiscation is quite distinct from the fine to which the boatmen are liable on conviction under Section 16 of the Salt Act. In omitting to pass any specific sentence on the manjees, the Magistrate has not proceeded according to law; and I, therefore, feel it my duty to refer this part of the case to the High Court in order that, if my opinion be considered correct, the Magistrate may be directed to pass sentence on the manjees. The appeals of the manjees and of Modon Mohun Pal Chowdhry are dismissed.

Judgment of the High Court.

Jackson, J.—We think it unnecessary to make any order in the matter referred.

For a breach of the salt laws the Magistrate of Howrah confiscated the salt, the boat, and packages, and having previously observed in his judgment that by Section 18 the owner and the persons concerned in the transport were liable to penalties, he fined the owner Rs. 500, the charander Rs. 200, and, as to the manjees, he held the confiscation of the boat punishment enough, and inflicted no fines.

The accused appealed to the Court of Session, and the Judge, rejecting the appeal of the owner, set aside (he uses the word "remit") the fine on the charandar on the ground that the principal was liable; but he

Digitized by Google

considers the Magistrate to have acted irregularly in refraining from fining the manjees, and suggests that this Court should require the Magistrate to do so.

We do not agree in the Judge's view of the liability of the parties in this case. The owner was not constructively, but actually transgressing, the law, and was, therefore, liable to the fine. The charandar was the person in charge and transporting the salt, and, if he knew what he was doing, was therefore equally liable.

As to the manjees, it seems very doubtful whether they are liable under Section 18. They having merely let their boat to a person holding a rowannah, may or may not have been justly liable to fine; but we certainly should not think it our duty to insist on the infliction of a fine when they had been already punished by the loss of their boat and its equipment.

The 11th December 1874.

Present:

The Hon'ble W. Ainslie and W. F. McDonell, *Judges.*

Complainant—Witnesses—Act X of 1872 *ss.* 215 *&* 362.

Reference to the High Court under Section 296 *of the Code of Criminal Procedure by the Sessions Judge of Gya.*

Jeldhari Singh and another,

versus

Shunkur Doyal and others.

It is not incumbent on the Magistrate to summon every person named as a witness by the complainant. Section 215, Explanation 3 of the Criminal Procedure Code, must be read with s. 362, which vests a discretionary power in the Magistrate.

Reference.—THE facts of the case are that a complaint of an offence punishable under Sections 323, 325 of the Penal Code was made by Jeldhari Singh and Lochun Singh. The Deputy Magistrate, after summoning the accused and examining two only of the witnesses named by complainant, discharged the accused.

I think that the order of the Deputy Magistrate, dated August 6th, 1874, is illegal, as it is contrary to the provisions of Section 215 of the Criminal Procedure Code. See 22 W. R., p. 25.

Judgment of the High Court.

Ainslie, J.—We see no ground to interfere. Section 215, Explanation 3, must be read with Section 362. It is not incumbent on the Magistrate to summon every person named as a witness by the complainant, and we think it must be taken that he was exercising the discretion vested in him by Section 362.

The 11th December 1874.

Present:

The Hon'ble W. Ainslie and W. F. McDonell, *Judges.*

Breach of the Peace — Security — Witnesses—Act X of 1872 *ss.* 491, 496, *&* 497.

Reference to the High Court under Section 296 *of the Code of Criminal Procedure by the Sessions Judge of Gya.*

Chulan Tewari

versus

Sukedad Khan and others.

Under the Sections (491, 496, & 497) of the Criminal Procedure Code relating to security for breach of the peace, the party charged is not entitled, when sufficient time has already been given him to show cause and to produce his witnesses, to an adjournment in order to produce his witnesses. In such a case, he must either bring his witnesses with him or apply for summons in such time as to enable him to bring them into Court on the day fixed.

Reference.—THE facts of the case are that a report of the police was submitted to the Assistant Magistrate who was in temporary charge of the Magistrate's office, on receipt of which the Assistant Magistrate ordered a summons under Section 491 of the Criminal Procedure Code to be issued to Sukedad Khan and Saidam Khan. Subsequently, the Magistrate of the district directed the Joint Magistrate to proceed with the enquiry, and on November 3rd the parties appeared in his Court, and evidence was recorded in support of the order asked for by the police.

Time was allowed (to November 10th) for Sukedad and Saidam to show cause against the order asked for, and on November 11th four witnesses were examined on their behalf, and they were ordered to give security under Section 497 of the Criminal Procedure Code.

They have now presented a petition to have the Joint Magistrate's order set aside on the

Digitized by Google

following grounds, *viz.*: 1*st*—That the original summons was issued by the Assistant Magistrate who had no jurisdiction under Chapter 37 of the Criminal Procedure Code (see Sections 26 and 34); 2*nd*—That no sufficient opportunity was given to them to show cause why they should not be bound; 3*rd*—That the Joint Magistrate refused to summon certain witnesses in their behalf according to their petition, dated November 10th; 4*th*—That the Joint Magistrate did not adjudicate on the question of right, or even of actual possession, as between the contending parties. (See 19 W. R., p. 47.)

As to the first objection I think that Section 283 will apply, and that as the parties were actually in attendance in the Joint Magistrate's Court on November 3rd, the objection is of no value. (See explanation to Section 492.)

As to the second objection I think that the week (from November 3rd to 10th) allowed by the Joint Magistrate was sufficient opportunity to show cause.

As to the fourth objection I think that as the evidence disclosed an intention on the part of the petitioners to assert their right *by force*, the Joint Magistrate was not bound to enquire into the question of right or even of actual possession in the absence (according to the Joint Magistrate's opinion) of reliable evidence to show that the petitioners were merely acting in self-defence.

I am, however, of opinion that the order of the Joint Magistrate, dated November 11th 1874, requiring petitioners to give security is illegal, and should be set aside on the third ground noted above. According to the recent ruling of the High Court, dated August 21st 1874, in a case referred by this Court (Cheyt Singh and Oomrao Singh, petitioners*) a Magistrate is bound to issue summons to witnesses named by the party from whom security is required. Until the day fixed for attendance of witnesses had arrived, the petitioners could not tell whether their witnesses would attend or not, and until the evidence of these witnesses be recorded, it cannot be said that the petitioners are not prejudiced by the failure of the Joint Magistrate to issue summons for their attendance.

If the Joint Magistrate had reason to think that the petitioners' request was made with any improper object, he should have proceeded under Section 359 of the Criminal Procedure Code.

* *Ante*, p. 70.

Judgment of the High Cour

Ainslie, J. — On the 26th of Sukedad Khan and another were cal to appear on the 2nd of November, a cause why they should not be bound keep the peace. On the 3rd of N they put in a petition showing c containing a list of witnesses whom posed to examine. On the same witnesses on the other side were e and they were also personally questi the Magistrate, and an adjournmen November was allowed for them to their witnesses. On the 10th of N they did produce certain witnesses, the same day stated that they could duce other witnesses without the a of the Court, and asked for summo Magistrate refused to grant the s and made an order directing them security. Sukedad Khan and Saida then applied to the Judge objectin order on four grounds,—one of which no sufficient opportunity was given show cause why they should not b The Judge says:—"As to the second I think that the week (from Novem to 10th) allowed by the Joint M was sufficient opportunity to show If so, it is quite clear that the allowed from the 26th October to November was more than sufficie the Judge is of opinion that one of objections is valid, namely, that t Magistrate refused to summon cert nesses in their behalf according petition, dated November 10th. In of his reference he cites a case rece posed of by this Court, that of Chey and Omrao Singh,* referred by him. appears to us that he has failed to distinction between that and the pres In referring that case he himself m ground of reference that sufficient not been allowed, and this Court in of it showed from the Magistrate's o sufficient time could not have been In the present case the Judge him that sufficient time was allowed, and in fact that no less than double which the Judge considers suffici actually allowed. The Judge ap think, on the authority of the case him, that the petitioners were en another adjournment on the 10th N

* *Ante*, p. 70.

Digitized by Google

in order to enable them to take out summons. In that we think he is wrong.

On looking to the Sections of the Criminal Procedure Code on the subject of security to keep the peace, we find in the first explanation in Section 491 that a Magistrate cannot bind over a person until he has adjudicated on evidence before him. He is to take evidence, and therefore of necessity he is to take it in the presence of the person who is to be affected by it, or of some person properly representing him. The 494th Section provides for what the Magistrate is to do if the person summoned does not attend at the time and place named in the summons on the day appointed. The 496th and 497th Sections prescribe what the Magistrate is to do if the person complained against does appear on the day appointed. He is, according to these Sections, to satisfy himself whether there is occasion to bind such person to keep the peace; that is, he is to satisfy himself on the evidence which he takes in the presence of the parties. And having considered that evidence, he is ordinarily then and there to make an order either discharging the person informed against, or directing him to enter into a bond with or without security, as the case may be. It is quite clear from this that the Code requires that all the steps necessary to bring witnesses before the Court should be taken in such time as to admit of the evidence being recorded on the day on which the party comes into Court; and in fact, that showing cause is not the mere putting in a written, or making a verbal, statement, but the supporting of that statement by such evidence as the party may be able to produce. He may bring his witnesses with him if he likes. If he has doubts as to his ability to produce them, he may apply for summons. If it is necessary to take out summons, he is bound to apply for summons in such time as to enable him to bring his witnesses into Court on the day fixed.

In the case of Cheyt Singh that could not be done. The Magistrate himself said that it was impossible to bring the witnesses into Court on the day fixed, and therefore his order was set aside.

In this case, if we take the time as given by the Judge, we should have to hold that there was sufficient time allowed to bring the witnesses into Court, and as before said the actual time before final hearing was extended by a week.

We think we ought not to interfere. The papers must be returned.

The 12th December 1874.

Present:

The Hon'ble W. Markby and W. F. McDonell, *Judges.*

Conviction—Principal—Murder.

The Queen

versus

Mohamed Asger and another, *Appellants.*

Committed by the Deputy Magistrate, and tried by the Judicial Commissioner of Sylhet, on a charge of voluntarily causing grievous hurt and abetting thereof.

Where a blow is struck by A in the presence of and by the order of B, both are principals in the transaction; and where two persons join in beating a man and he dies, it is not necessary to ascertain exactly what the effect of each blow was.

Markby, J.—THE Sessions Judge has taken a view which is not quite borne out by the facts of the case as found by him. He finds that the blow was struck by one prisoner in the presence of and by the order of the other; which is a finding that both were principals in the transaction, not that one was principal and the other accessory.

It was also, we think, incorrect to say that because two blows were struck, one by the prisoner Kanie Meeah and the other by Asger not in custody, and that it is not certain which of the two blows fractured the skull, the prisoners under trial could not be convicted of either murder or culpable homicide amounting to murder. If two persons join in beating a man and he dies, it is not necessary to ascertain exactly what the effect of each blow was. There was ample evidence in this case of a common intent.

There is no ground on which the prisoner can appeal. The view of the law taken by the District Judge, though incorrect, was not one of which the prisoner can complain.

Digitized by Google

The 22nd December 1874.

Present:

The Hon'ble Sir Richard Couch, Kt., *Chief Justice*, and the Hon'ble F. B. Kemp, Louis S. Jackson, J. B. Phear, and W. Markby, *Judges.*

Evidence—Simple Affirmation—Oath—Act X of 1873 s. 13.

The Queen

versus

Sewa Bhogta, *Prisoner.*

HELD by the majority (Jackson, J., dissenting) that the evidence of a witness who was examined on simple affirmation under the direction of the Judge is admissible as evidence. The word "omission" in Section 13 of the Oath's Act X of 1873, includes any omission and is not limited to accidental or negligent omissions.

THIS case was referred to the High Court for confirmation of sentence of death passed by the Judicial Commissioner of Chota Nagpore.

It came on for hearing before a Division Bench consisting of the Hon'ble the Chief Justice and the Hon'ble Mr. Justice Ainslie, who referred it to a Full Bench under the following order :—

Couch, C. J.—Appeal admitted to be heard on the 25th November next, before the Chief Justice and Justices Kemp, Jackson, Phear, and Markby, in consequence of the decision in 22 Weekly Reporter, Criminal Rulings, page 1, the witness No. 3 having been allowed to give evidence on simple affirmation.

Let the usual notice issue.

Judgments of the Full Bench.

Couch, C.J. (*Kemp, Phear, and Markby, J.J. concurring*).—We are of opinion that the word "omission" in Section 13 of Act X of 1873 includes any omission and is not limited to accidental or negligent omissions. In this case the affirmation was in fact omitted to be made, although it was done deliberately and under the direction of the Judge. The intention appears to have been to provide for every omission, substitution, or irregularity. There is, therefore, no objection to the validity of the conviction, but under the circumstances and considering the evidence in the case, we think the sentence of death should not be confirmed.

Instead thereof we pass a sentence of transportation for life.

Jackson, J.—I am unable to concur in the opinion of the majority, as I cannot take the same view of the intention of the Legislature in using the word "omission."

It seems to me that in framing the 13th Section of the Oath's Act, it was intended to obviate the effect of any evasion on the part of witnesses or mistake on the part of officers of the Court, and not to give a power to Judges or Magistrates to render the whole Act as it were ineffectual by perversely or erroneously ordering that witnesses should not take an oath or affirmation. It will be borne in mind that the oath is not merely imposed, in criminal cases, by the Act X of 1873, but the Code of Criminal Procedure, Section 331, expressly requires that witnesses shall be examined on oath or affirmation, &c., according to the provisions, &c.

It seems to me, therefore, that the Judge in this case having been directed by law to examine the witness in question upon affirmation, and having determined that he would not administer such affirmation, the witness has been examined contrary to law and the evidence is inadmissible.

The 4th January 1875.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Jurisdiction—Conditional Pardon—Commitment—Act X of 1872 s. 349.

Reference to the High Court under Section 296 of the Code of Criminal Procedure by the Sessions Judge of Patna.

The Queen

versus

Mullik Jeechoo.

A party, charged along with others with murder, having had a conditional pardon granted to him by the Deputy Magistrate, retracted before the Sessions Judge the statements he had made before the Deputy Magistrate. On being sent back to the Deputy Magistrate, that officer committed him for trial on a charge of giving false evidence. The Sessions Judge considered that the Deputy Magistrate was bound under s. 349, Code of Criminal Procedure, to commit on the original charge of murder, and not on that of giving false evidence, and he recommended that the order of commitment should be quashed and the Deputy Magistrate directed to commit on the charge of murder.

Digitized by Google

The High Court declined to interfere as there was evidence on the record tending to support the charge for giving false evidence, and as s. 349 did not have the effect of taking away from Magistrates the power to entertain a charge of this kind.

Reference.— I HAVE the honor to submit for the consideration of the High Court the record of this case, and to solicit an expression of their opinion as to the propriety of the course taken by the committing officer.

The Court will observe from the grounds of commitment recorded by the Deputy Magistrate that the accused Mullik Jeechoo was originally placed before him, together with two others, on a charge of murder; that the evidence adduced on the part of the prosecution not being considered to be sufficient to establish the charge, the accused Mullik Jeechoo was offered a conditional pardon, which he accepted; that he made a statement before the Deputy Magistrate in which he described the manner in which the murder had been committed, and the case was accordingly sent for trial before this Court, Mullik Jeechoo being named as one of the witnesses for the prosecution. When the case came on for trial before my *locum tenens* Mr. Allen, the present accused Jeechoo retracted all he had stated before the Deputy Magistrate, and declared it to be false. He was thereupon sent back to the Deputy Magistrate in order that he might be proceeded against either on the original charge of murder, or on that of giving false evidence. The Deputy Magistrate has now sent him up for trial on the charge of giving false evidence.

The question which I wish to submit for the consideration of the Court is whether under such circumstances the Deputy Magistrate had any option in the course to be followed; whether he was not bound to commit the man for trial, if he thought proper to commit him at all, on the original charge, *viz.*, that of murder, and not upon that of giving false evidence. It is quite *true that* the wording of Section 349, Criminal Procedure Code, does not expressly exclude any course other than that therein laid down, but I nevertheless think that it was clearly the intention of the Legislature in enacting that Section to indicate the course which ought to be taken in all such cases, and not to leave it optional with the Criminal Courts to adopt that or some other as they might think fit. I cannot but think that under circumstances such as those disclosed in this case a prosecution on a charge of giving false evidence is highly unadvisable; and as it seems to me to be also unwarranted by law, I beg to recommend that the commitment of Mullick Jeechoo be quashed, and the Deputy Magistrate be directed to proceed, if he thinks fit to do so, in accordance with the provisions of Section 349 above cited.

Judgment of the High Court.

Phear, J.—We think we cannot interfere in the matter of this reference which has been made to us by the Sessions Judge. There appears to be evidence on the Deputy Magistrate's record tending to support the charge upon which the Deputy Magistrate has committed the accused for trial. And it is not suggested to us by the Judge that the Deputy Magistrate had not jurisdiction to entertain that charge. This being so, we cannot quash the commitment unless there is any thing (and the Judge appears to imagine there is) in Section 349 of the Criminal Procedure Code to forbid a charge of this kind being entertained under the peculiar circumstances of the case. But the reasons given by the Judge for this view are not very distinct. He says:—"It is quite true "that the wording of Section 349, Criminal "Procedure Code, does not expressly exclude "any course other than that therein laid "down, but I nevertheless think that it "was clearly the intention of the Legislature "in enacting that Section to indicate the "course which ought to be taken in all such "cases, and not to leave it optional with the "Criminal Courts to adopt that or some "other as they might think fit. I cannot "but think that under circumstances such "as those disclosed in this case a prosecution "on a charge of giving false evidence is "highly unadvisable, and as it seems to me "to be also unwarranted by law, I beg to "recommend that the commitment of Mul-"lik Jeechoo be quashed."

Without expressing any opinion whatever as to the advisability of this particular prosecution, all we can say is that we do not concur with the Judge in thinking that Section 349 has the effect of taking away from Magistrates the power to entertain a charge of this kind. The substance of the charge is entirely different from that of the original charge, and the two offences are in all respects distinct. For the reasons which we have already given, we find ourselves unable to say that the Magistrate had not jurisdiction to make the commitment; and inasmuch as there seems to be evidence, whatever it may be worth, to support it, we have not sufficient authority in this reference to interfere with that commitment.

Digitized by Google

The 26th November 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Advocate of High Court—Prosecution—Sessions Court.

(Criminal Motion: Case No. 196 of 1874.)

Gungadhur Sircar, *Petitioner.*

Mr. Palit and *Baboo Gooroo Dass Banerjee* for the Petitioner.

An advocate of the High Court may appear on behalf of the prosecution in the Court of Sessions and conduct the prosecution without being specially empowered by the Magistrate of the district for that purpose.

THE facts stated in the petition were shortly as follows:—

The petitioner was the complainant in a case pending before the Court of Session at Howrah. Being desirous of having the prosecution conducted at his own expense by an Advocate of the High Court, he applied to the Magistrate of Howrah, under Section 235, Criminal Procedure Code, that his Counsel (naming him) might be specially empowered to conduct the prosecution. The Magistrate, who had specially empowered a pleader in that behalf, refused the application but assigned no reason whatever for such refusal.

The petition concluded with the following prayer:—

Your petitioner therefore humbly prays your Lordships for an order that the said District Magistrate of Howrah do permit your petitioner's Counsel (naming him) to conduct the said prosecution at your petitioner's expense, or that a rule do issue out of and under the seal of, this Honourable Court, calling upon the said Magistrate to show cause why the said Counsel should not be allowed to conduct the said prosecution, and that pending the disposal of such rule as aforesaid the hearing of the above case be adjourned by the Sessions Judge of Howrah, or for such other order as the justice of the case requires and to your Lordships may seem proper.

Mr. Palit (with him Baboo Gooroo Dass Banerjee) in support of the petition.

Mr. Palit.—Section 235, Criminal Procedure Code, provides "that in every trial before a Court of Session, the prosecution shall be conducted by the public prosecutor, Government pleader, or by *some other officer specially empowered by the Magistrate of the District in that behalf.*" The Counsel for the petitioner does not fall under either the first or the second category. He is neither a public prosecutor nor a Government pleader. He must, therefore, it is apprehended, to be entitled to conduct the prosecution, be specially empowered by the Magistrate in that behalf. This, no doubt, gives the Magistrate a discretion in the matter. But discretion, says Lord Mansfield, when applied to a Court of Justice, means *sound* discretion *guided by law.* It must be governed by rule, and not by humour or caprice. It must not be arbitrary, vague, and fanciful, but legal and regular.—(See R. *v.* Wilkes, 4 Burrow's Reports, 2539).—Under Section 186, Criminal Procedure Code, an accused person may, with the *permission of the Court*, be assisted in his defence by a mookhtear, and this Court by its circular declared that the "terms of Section 186 do not warrant any general rule for the exclusion of mooktears, but only allows discretion in each case as it arises." (Circular 13, May 29, 1870). This shows that in the *absence* of *special* circumstances, an accused could not be deprived of his right to be defended by any one who has a distinct legal *status* by virtue of which he could defend the accused. By parity of reasoning a complainant could not be deprived of any professional aid which he *might wish* to secure without the existence of *special* reasons, and none have been assigned in this case. It is submitted that the petitioner herein had an undoubted right to have the prosecution conducted by a Counsel of his own choice, and that the Magistrate was not justified in refusing him permission to do so.

Judgment of the High Court.

Kemp, J.—This is an application on the part of Gungadhur Sircar. It appears that in the case of the Queen *v.* Abinash Chunder Bose, a trial is now being held before the Sessions Judge of Howrah. The petitioner applied to the Magistrate for his permission to enable an Advocate of this Court to appear and conduct the prosecution on behalf of the petitioner Gungadhur Sircar. Gungadhur Sircar in his petition to this Court states that although two applications were made to the Magistrate under the provisions of Section 235

Digitized by Google

of the Code of Criminal Procedure, the Magistrate passed no orders upon these petitions, and has returned the petitions to the petitioner without any order. The Court has been asked to adjourn the Sessions trial, and to call upon the Magistrate to show cause why the petitioner's Counsel should not be allowed to conduct this prosecution on behalf of his client Gungadhur Sircar. We do not think it right to adjourn the trial which is now going on before the Sessions Judge at Howrah, and we are of opinion that an advocate of this Court can appear on behalf of Gungadhur Sircar in the Court of Sessions at Howrah, and that it is not necessary that he should be specially empowered by the Magistrate of the District for that purpose.

We, therefore, direct the Sessions Judge to permit the petitioner's Counsel to appear in his Court on behalf of Gungadhur Sircar and to conduct the prosecution on behalf of that individual. The order will issue immediately.

The 6th January 1875.

Present :

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Jury—Verdict (Objection to).

(Criminal Motion : Case No. 12 of 1875.)

Bindabun Chunder Dutt, *Petitioner,*

versus

Dwarka Nath Sen, *Opposite Party.*

Baboo Doorga Mohun Dass for the Petitioner.

Where a party objects to the verdict of a jury, he ought to give the Magistrate reasonable *primâ facie* ground for the opinion either that the jury did not in fact apply a judicial discretion to the case, or that the verdict was such as the jury could not have arrived at by a proper exercise of their discretion upon the materials before them.

Phear, J.—We think that this application must be rejected. At the same time we desire not to be understood as laying down by implication a rule that no case can occur in which the Magistrate ought to listen to objections made against the verdict of the jury. If grounds of objection were brought to his notice of such a character as to justify the conclusion that the verdict was not a proper verdict, then he ought to inquire into the validity of those grounds. In the present case it was objected that three of the jurors had, previously to entering upon the inquiry, expressed their intention of finding a verdict in a specified way, irrespective of the evidence which might be laid before them. If they had in fact expressed an intention of this kind, there can be no question that they were very unfit persons to sit upon the jury. But also in that event, the petitioner ought to have made the Magistrate acquainted with this fact as soon as he became aware of it. If he learned it before the inquiry commenced, he ought immediately to have objected to the fitness of these persons to discharge the duty of jurors. In the petition which has been read to us, there is only a bare statement that these three jurymen had expressed themselves in this way in a conversation held by them with a person whom the petitioner proposed to call as a witness of the fact. The petitioner does not say when he first learnt the fact—whether it was before the inquiry took place or afterwards, nor is he specific in his statement of the time, place, and details of the conversation. If a bare allegation of the indefinite kind now made by the petitioner ought to oblige the Magistrate to entertain, and to take evidence upon, the objection so made to the verdict, then probably, as the Magistrate in the present case says, it would be better that there should be no such thing as the trial of a question of this kind by a jury at all. The objection must at least be made as specifically as possible. The objector must pledge himself to establish definitely such facts as would, when proved, suffice to render the verdict invalid and improper. It is certainly not enough, in our opinion, for him merely to make a vague allegation of such a kind as that which has been made in the matter before us. He does not here even go the length of saying that the verdict which was ultimately arrived at was not a right verdict upon the evidence which was before the jury. He says, no doubt, that it was opposed to the testimony of the majority of the witnesses. But that may well enough be the case, and yet the verdict may be a reasonable verdict. He must, we think, go further than this and give the Magistrate reasonable *primâ facie* ground for the opinion either that the jury did not in fact apply a judicial discretion to the case or that the verdict was such as the jury could not have arrived at by a proper exercise of their discretion upon the materials before them. The application must be rejected.

Digitized by Google

The 7th January 1875.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Confession—Certificate—Act X of 1872 *s.* 122.

The Queen

versus

Jetoo and others, *Appellants.*

Committed by the Assistant Magistrate, and tried by the Sessions Judge of Tipperah, on a charge of committing murder while committing dacoity.

Baboo Omesh Chunder Banerjee for the Appellants.

Section 122 of the Code of Criminal Procedure, which requires a Magistrate to certify on a confession his belief that it was voluntarily made, does not apply to the case of a confession taken by a Magistrate who is actually investigating the case and examining the witnesses preparatory to commitment; but to a case where some other Magistrate takes a confession and forwards it to the Magistrate by whom the case is inquired into or tried.

Phear, J.—We are satisfied that the verdict of the Lower Court is a good verdict against all the prisoners. The evidence seems to us to be very strong, and the guilt of the prisoners does not to our minds admit of any reasonable doubt.

It has been objected before us on the part of some of the prisoners that the evidence of the confessions made before the Magistrate by Busseeruddin and Jetoo was not admissible, because the document does not bear upon the face of it the endorsement which is prescribed by Section 122 of the Criminal Procedure Code, in these words:—"I believe that this confession was voluntarily made."

But it seems hardly necessary for us to remark that this Section does not apply to the case of confessions taken by the Magistrate who is actually investigating the case and examining the witnesses preparatory to commitment. It applies to a case where some other Magistrate takes a confession and forwards it to the Magistrate by whom the case is inquired into or tried. When this is done, Section 122 makes it incumbent upon the Magistrate to take down the confession and forward it to the Magistrate engaged in inquiring into the case, with the endorsement of his belief that the confession was voluntarily made. Section 346 of the Criminal Procedure Code is the Section which governs the present case.

We dismiss the appeal.

The 8th January 1875.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Theft—Stolen Property—Presumption of Guilt.

Committed by the Magistrate, and tried by the Sessions Judge of Sarun, on a charge of dealing habitually in stolen property.

The Queen

versus

Poromeshur Aheer, *Appellant.*

Mr. M. L. Sandel for the Appellant.

Possession of property which has been stolen from the owner is generally at best only evidence of theft when the date of the theft is so recent as to make it reasonable to presume in the absence of explanation that the person in whose possession the property is found must have obtained the possession by stealing.

Phear, J.—In this case the prisoner has been convicted of the offence of having dishonestly received stolen property knowing it to be stolen, and also of the offence of habitually receiving or dealing in property which he knew or had reason to believe was stolen property.

The evidence in the case is exceedingly simple. It appears that the police acting upon certain information searched the house of the prisoner, and there they found a considerable number of brass articles. The person who had given the information which led to the search, did not claim to be *the* owner of these articles. But two *days after* the search, some four persons came forward and respectively identified different articles out of the lot as their own property, and said further that these had been stolen from them on some former occasions, more or less remote in the different cases.

It seems to us plain that this evidence alone is not sufficient to support the conviction at which the Sessions Court has arrived. Possession of property which has been stolen from the owner is generally at best only evidence of theft. Taken *alone*, it is not, strictly speaking, evidence of the possessor having received the property from another person with the knowledge that it was stolen, though a presumption to that effect may be raised upon it, if there be evidence tending to show that some one else was the thief. Still less, if we may say so, is it evidence of dealing in property with the knowledge that it was stolen.

Digitized by Google

Moreover, possession of stolen property cannot safely be treated as evidence even of theft except when the date of the theft is so recent as to make it reasonable to presume in the absence of explanation that the person in whose possession the property is found must have obtained the possession by stealing. If any considerable interval of time has elapsed between the date of the theft and the date when the property is found in the possession of the person accused, then no presumption of guilt ought to be founded on that possession alone. (See illustration (*a*) Section 114 of the Evidence Act.)

Now in the present case we observe that of the witnesses who recognized the property as theirs, and said that it had been previously stolen from them, two put the original theft at an interval, in the one, of a year, and in the other case, of two years. And in these cases it seems to us that the interval is too long to justify the inference which might be raised upon the possession of stolen property if the theft had occurred very recently before the time when the property was found.

There still remains three cases in which the prosecutors say that the property was stolen very shortly before the date when these articles were found in the possession of the prisoner. And we think that in these cases the inference may be justly raised against the prisoner so far as to throw upon him the responsibility of accounting how he came by the property. And the Sessions Court is not satisfied with the account which the prisoner gives on this point. It has arrived at the conclusion that the identification of the property by the prosecutors may be sufficiently depended upon. We have given our best attention to the evidence. And we are unable to say that this conclusion is wrong, at any rate so far as regards two out of these three cases. It seems to us that there is, in the case of Bhugwan Dass and in the case of Gobindo Dass, good ground for thinking that the prosecutor's testimony could be depended upon in the matter of this identification. If this be so, the prisoner's story is certainly not satisfactory, and does not afford any excuse for his possession of the property. We therefore think that he ought to be convicted in these two cases of having stolen the property which the prosecutors identified. But as has already been mentioned, we are of opinion that the convictions which the Sessions Court have made against the prisoner cannot be sustained upon the evidence and must be therefore set aside. In lieu thereof, he must be convicted of having stolen property of Bhugwan Dass and Gobindo Dass under Section 380 of the Penal Code.

We also are of opinion that the sentence which has been passed upon the prisoner is too severe to meet the interests of justice in this case. Even had we allowed the original conviction to stand, we should have thought it open to question whether 10 years' rigorous imprisonment coupled with a fine of Rs. 1,000 would not be unnecessarily severe, but it is obviously too severe a sentence for the two offences of which we think the prisoner ought to be convicted. In our opinion the sentence should be reduced to four years' rigorous imprisonment.

The original convictions will be set aside, the sentence quashed, and the fine remitted. If it has been paid it must be refunded.

The 13th January 1875.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Theft—Fine—Complainant—Frivolous Charge —Act X of 1872 *s.* 209.

Reference to the High Court under Section 296 *of the Code of Criminal Procedure, by the Magistrate of Rajshahye.*

Kali Churn Lahiree

versus

Shoshee Bhooshun Sanyal.

The High Court declined to interfere with the order of a Deputy Magistrate, who, in a case of theft, dismissed the complaint and fined the complainant under Section 209 of the Code of Criminal Procedure for making a frivolous and vexatious complaint.

Reference.—On the 16th April 1874, complainant presented a petition to the Deputy Magistrate, Baboo Bhuboneshwar Singh of Nattore, charging one Shoshee Bhooshun Sanyal with the theft of certain property belonging to him. The Deputy Magistrate recorded an order that the petition be put up with the police report. On the 17th idem the complainant filed another petition before that officer when he was examined, and the case was made over for trial to the Sub-Deputy Magistrate. The

Digitized by Google

latter officer, as it appears, did not take down the depositions of the principal witnesses of the complainant.

The Sub-Deputy Magistrate dismissed the case and fined the complainant Rs. 30 under Section 209, Code of Criminal Procedure, for having made a frivolous and vexatious complaint. The amount was ordered to be paid, on realization, to the defendant.

The order of the Sub-Deputy Magistrate directing the complainant to pay a fine, is illegal. The fine ought to be remitted.

Section 209 refers to summons cases, whereas the charge in this case was one of theft.

I am unable to forward the explanation of the officer who tried the case, as he is on leave. There are several irregularities which will be enquired into when the record is received back from the High Court.

Judgment of the High Court.

Phear, J.—We do not think that interference of this Court is necessary in this matter.

The papers will be returned to the Magistrate.

The 13th January 1875.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Dacoity—Belonging to a Gang of Dacoits—Act XLV of 1860 s. 400.

The Queen

versus

Mooktaram Sirdar, *Appellant.*

Committed by the Magistrate and tried by the Sessions Judge of Midnapore on a charge of belonging to a gang of persons associated for the purpose of habitually committing dacoity.

Mr. M. L. Sandel for the Appellant.

It is necessary, in order to establish a charge under section 400, Penal Code, that the prosecution should make out that there existed at the time specified a gang of persons associated together for the purpo tually committing dacoity, and that the accus of the gang.

Phear, J.—On consideration of dence which is on the record in we are of opinion that it suffices to the charge upon which the prisoner tried,—that is, a charge framed under 400 of the Penal Code, to the effect prisoner belonged to a gang of person ciated for the purpose of habitually co ting dacoity. We need hardly remar the offence is one of a very special cha and entirely the creature of statute, necessary, in order to establish a under this section against an accused that the prosecution should make there existed at the time specified of persons associated together for the of habitually committing dacoity, a the accused person was one of th In the course of considering this case occurred to us that the peculiar natur offence of which the prisoner was was not sufficiently borne in mind Sessions Judge throughout the tria the witnesses were being examined depositions of the different witnesses may say almost all of them, exce meagre and concise, and the exam throughout seems to have been ver directed to the object of showing there did exist at any time a particula of persons with whom the prisone associated. However, on the whole, already been intimated, we think th testimony of the different witnesse they are many in number) notwithst the defects of the examination does d and make out that a gang of perso exist at the time of which the wit speak, associated together for the purp habitually committing dacoity, and tha prisoner was not only a member of that but in a very considerable degree its lea

It also seems to be very clear that he part in committing a great number dacoities to which the different witne speak, and there is no ground shown ei in the petition of appeal or in any other for distrusting the substance of the evid afforded by the different witnesses.

We are therefore of opinion that appeal ought to be dismissed.

Digitized by Google

The 13th January 1875.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Summary Procedure—Rioting—Accused Persons—Public Justice.

Reference to the High Court under Section 296 of the Criminal Procedure Code by the Sessions Judge of Mymensingh.

The Queen

versus

Aboo Sheikh and others, *Petitioners.*

Where a charge of rioting was tried summarily by the Magistrate as one of mischief and unlawful assembly, the Sessions Judge, relying on a case cited, submitted at the request of the accused that the summary order may be set aside, and the accused may be tried for rioting under Chap. XVII of the Criminal Procedure Code.

The High Court declined to interfere at the instance of the accused persons, and distinguished this from the case cited by the Sessions Judge, as the reference there was made by the Magistrate in the interests of public justice.

Reference.—A CHARGE of rioting, arising out of a dispute about land, was laid before the Joint Magistrate, who proceeded to try the case summarily as one of mischief and unlawful assembly under Sections 426 and 143 of the Penal Code, this proceeding being illegal as ruled by the Hon'ble Court, W. R., Vol. XXII, page 29, in a case which is exactly in point.

The evidence clearly shows that the charge was one of rioting. Mr. —— from the tenor of his remarks in explanation seems clearly to be under the impression that to constitute rioting there must be personal violence. He states:—"No charge of rioting "was preferred. The complainant stated "in his petition that the accused came in an "armed body to my baree, caused mischief "to my kallai, cut my dhan, &c. I was "present, but ran away when they came. "The party then proceeded to carry out "their object of causing mischief by tramp-"ling down and cutting the kallai and "cutting the dhan. No personal violence "whatever was done to the complainant."

The petitioners in this case desire that the summary order of the Joint Magistrate being set aside, they may be tried for the offence of rioting under the procedure prescribed by Chapter XVII of the Criminal Procedure Code, and I submit that they are entitled to this and that the order of the Joint Magistrate should be set aside. Pending the orders of the Hon'ble Court the prisoners are on bail.

Judgment of the High Court.

Phear, J.—We think that we are not called upon to interfere in the matter of this reference at the instance of the accused person. This case differs materially from the case to which the Judge in his referring letter alludes, because there the reference was made by the Magistrate in the interests of public justice.

The Deputy Magistrate had, after a very cursory inquiry into the matter of the charge against certain accused persons, dismissed the charge altogether: the effect of which was probably, under the circumstances which happened, to place an obstacle in the way of prosecuting the accused persons upon the charge which had been made against them.

The papers must be returned.

The 14th January 1875.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Complaint—Delay—Breach of the Peace—Act X of 1872 s. 491.

(Miscellaneous Case.)

Mohunt Luchmee Dass and others, *Petitioners,*

versus

L. J. Crowdy, *Opposite Party.*

Mr. J. T. Woodroffe and *Baboo Chunder Madhub Ghose* for Petitioners.

Mr. M. L. Sandel for the Opposite Party.

Where a complaint of breach of the peace under s. 491 of the Criminal Procedure Code made in April last was transferred on account of a question of jurisdiction from one Deputy Magistrate to another without final orders being passed, the High Court (in January 1875) not being able to find that any breach of the peace had been committed by any one, considered

Digitized by Google

that it would not be proper to make an order on a complaint preferred so long ago, and directed the dismissal of the complaint made in April last.

Phear, J.—In April last year, the petitioners now before the Court were summoned by the Magistrate of Beguserai to show cause why they should not be required to enter into a bond to keep the peace, on the ground of information which had been laid against them by one Palit Lall Patwari. The parties appeared, evidence seems to have been taken in the matter, and finally on the 20th May the Magistrate arrived at the conclusion that proceedings under Section 530 of the Criminal Procedure Code were not only advisable, but necessary, before he could come to a final determination in the matter of the complaint before him. But inasmuch as the property, of which the possession was supposed to be in dispute, did not lie within the limits of his jurisdiction, but in that of the Deputy Magistrate of Durbhanga, he ordered that the papers of this case should be forwarded to that officer with a request that he would take action with respect to Bâd Chaudrahi under Section 530 of the Criminal Procedure Code, and return these papers to him with a copy of his proceedings and judgment.

We need hardly say that the step thus taken by the Magistrate of Beguserai was an unusual one. And it is not easy to see how he could rightly make his determination in the matter of a complaint falling under Section 491 of the Criminal Procedure Code,—that is, a complaint to the effect that a breach of the peace was likely to be committed,—depend upon the judgment of another officer in another division upon the matter of a complaint falling under Section 530 of the Criminal Procedure Code.

However, the papers and proceedings were sent according to his order to the Deputy Magistrate of Durbhanga; and no doubt when they came before him, they might reasonably enough afford sufficient ground for him to take steps under Section 530 of the Criminal Procedure Code if he thought such steps necessary. So far as we can learn, he did summon the parties before him. But it has been made matter of complaint to us that he did not take any evidence with regard to the possession of the land in respect of which it was his duty to inquire, or at any rate that he did not take evidence as to the actual possession of the land at the time when the complaint was made, but contented himself with looking into papers, orders, and judgments of various kinds and of a much antecedent date, from which he satisfied himself that some years previously the possession of this land had been adjudicated upon and declared to be in the hands of other parties than those of the present petitioners or their predecessors. He thereupon, *i.e.*, after discussing this documentary evidence at great length, said:—"I *hold it to* "be contrary to law again to *revive the* "question of possession under *the new law,* "Section 350, Criminal Procedure *Code,* "which is an embodiment of the old law, "Act IV of 1840. I see no other course "open for the executive authorities but to "uphold the possession of the 1st party and "prevent breach of the peace." If he had logically followed out the conclusions at which he thus arrived, he ought to have made an order accordingly under Section 530 of the Criminal Procedure Code. But he does not do this. He merely acts upon the request made by the Magistrate of Beguserai, and directs the papers of the case to be returned to him without himself making any final order or decision or doing any thing in the matter at all, beyond expressing this opinion as to the proper course for the executive authorities to pursue.

On the 15th September, the complainant brought this *quasi* judgment of the Deputy Magistrate of Durbhanga and all the papers of the case under the notice of the Magistrate of Beguserai, and asked the Magistrate of Beguserai to treat the passage which I have just now read from the judgment as a judicial order in the case between the parties, and in pursuance of and in accordance *with* it to make, upon the footing of the *original* information of April 1874, an order which should direct the petitioners to give security.

Upon the matter being thus brought again before the Magistrate of Beguserai, he says he will take time to consider the papers before he gives a decision. But before any decision was come to by him he was replaced by another officer with inferior powers, who after taking up the case said that he was unable to deal with it finally, and therefore transferred it to the Magistrate of Monghyr for that purpose. And so far as we know, it may as a matter of theory be with the Magistrate of Monghyr at the present time. However, the papers have been sent for and have been brought before this Court under Section 297 of the Criminal Procedure Code; and it remains for us to pass such orders as we may think necessary in the case.

After this short narrative of what has taken place, it is hardly necessary for us to

Digitized by Google

say that the proceedings have been in a very high degree irregular. They truly speak for themselves. And if any final order adverse to the petitioners had been made upon the footing of them by either the Deputy Magistrate of Durbhanga or the Magistrate of Beguserai, it is probable that we might have found it necessary to quash that order. But as the case now stands, there appears to have been no final order passed by any Magistrate upon the matter of the complaint which was made to the Magistrate of Beguserai in April of the last year.

The essence of that complaint was that at the time when that complaint was made a breach of the peace was imminent, and that it was the duty of the Magistrate to bind down the present petitioners to keep the peace. It is pretty plain now after the lapse of the many months which have expired since that complaint was made, inasmuch as no breach of the peace has been committed by any one so far as appears from the present record, that it is not now necessary or right that an order for the giving of security should be passed upon the footing of that complaint. If any thing should occur in future, which should give rise to, or should afford new ground for, apprehension of a breach of the peace, then of course the requisite proceedings can be taken thereon for the preservation of the peace. But it seems to us upon the materials which are now before us that the present proceedings are mischievously irregular and protracted, and that such an order ought to be made in this matter as will have the effect of putting an end to them altogether. And that order will be that the complaint made in April 1874 should be dismissed. It is not necessary for us to send the case back to the Lower Court for the purpose of this order being passed, because we have authority to make the order ourselves; and *this* we accordingly do.

It has already been mentioned that the last paragraph of the judgment of the Deputy Magistrate of Durbhangah has been complained of as amounting to a decision or order improperly passed between the parties and likely to be productive of serious inconveniences unless it be set aside. It appears to us, however, that the passage does not amount to an actual order, and we think it sufficient to declare that it is not in fact and cannot operate as an adjudication of any sort as against the petitioners or any of the parties to the present proceedings.

The 20th January 1875.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Jury—Charge—Prosecution—Prisoner's Explanation.

The Queen

versus

Gunga Govind Palit, *Appellant.*

Committed by the Magistrate, and tried by the Sessions Judge of East Burdwan, on a charge of using as genuine a forged document.

Mr. M. M. Ghose and *Baboo Bhowanee Churn Dutt for Appellant.*

The High Court set aside the verdict of a jury in this case, because the Judge, in his direction to the jury, omitted to point out the absence of evidence very material to the case of the prosecution, and because he directed the jury to attribute an undue importance to the statements or excuses made by the prisoner in the explanation of certain documents.

Phear, J.—We think that the verdict of the jury in this case cannot be supported, and this for two reasons: *first*, because the Judge, in his direction to the jury, omitted to point out the absence of evidence very material to the case of the prosecution. And, *secondly*, because, in his charge he directed the jury to attribute an undue importance to the statements or excuses made by the prisoners in explanation of certain documents.

The part of the charge in which these errors occur, runs as follows:—

After dealing with the first question, whether the prisoner filed the documents A and B or not, the Judge goes on in the heads of the charge to the jury to say,—

"The second question is, did he file "them knowing or having reason to believe "that the date of the decree had been "altered?

"As to this look at col. 3 of the filing "petition, and compare the figure 2 (acknow- "ledged) in the prayer at foot.

"Has col. 3 been altered in any way or "not? and is the figure 2 written by the "same hand or not?

Digitized by Google

"If you are satisfied from that, that col. 3 "has not been altered, and that the same "hand wrote 1872, then it is clear that 1872 "is not the true date of the decree, and that "the prisoner wrote that untrue date.

"Then observe, the prisoner says in this "Court that he filed in the year of the "decree from Oomer C. Ghose's dictation "who looked at the copy of the decree for it "(Exhibit B,, and Oomer C. Ghose swears "he read out the date as it stood in Exhibit "B at the time.

"If so, Exhibit B could not have been "altered after it was filed; because, in that "case it would not correspond with column "3 in the petition.

"The result is that prisoner's defence, "that the alteration was made after filing in "the sherishta by the amlah or judgment-"debtor, is false.

"But he also says for the first time in this Court that the judgment-creditor may have sent him the decree thus altered.

"If this were the true answer, why did "not he say so from the first? and why now "does he hesitate to say that he wrote the "figure 2 himself from the decree as he "found it? It is reasonable to expect an "innocent party to explain suspicious "appearances at once if he can.

"Lastly, you should consider that the "pleader witness says the prisoner conduct-"ed the original suit from beginning to end, "and that he executed the decree on the "former occasion himself. The witness "Bunomalee Nundee says that the prisoner "was the beneficial decree-holder at the "time.

"If you believe either or both these wit-"nesses, it is to be expected that he knew "that the decree was passed in 1871, and not "in 1872.

"Under these circumstances can you "come to any other reasonable conclusion, "other than that he did know, at the time, "that the date of the decree had been "altered."

No doubt the excuses made by the prisoner may reasonably be made to bear the interpretation which the Judge puts upon them, namely, that they were inventions made on the spur of the moment in order to account for that which he could not honestly account for otherwise. And, inasmuch, as they were not in the judgment of the Court supported by the evidence, they would naturally give rise to suspicion with regard to the prisoner's honesty. They cannot, however, as it seems to us, at the most be carried further than this—they cannot rightly be mad the place of evidence of fact. think that the mode in which the put them to the jury, has induce to take them for more than they a worth. In that part of the cha has just been read out, the Judge "you are satisfied from that tha "has not been altered, and that "hand wrote 1872, then it *is* "1872 is not the true date of the d "that the prisoner wrote that unt The use of the words "true" and at this stage of the summing quite accurate. The Judge shoul "*correct*" and "*incorrect*" instea and "untrue." But, taking the in the sense of "*correct*," so far gather from the record, there no evidence before the Court by Court could be led to the conclus date 1872 was *not* the correct decree. The original decree itse in, and it does not appear upon that the prisoner made any st admission, which could be used to the effect that the actual decree was not 1872. Upon this namely, that the date of the decr 1872, but was 1871, the Jud jury that if they believe the plea and the witness Bonomali who the facts of the prisoner having the original suit from beginning also having executed the decree occasion, they ought to assume th the decree was passed in 1871 1872. It follows, therefore, plai conclusion falls with the abse original decree.

This, however, is a comparative ant point, for, even if it be as there is satisfactory evidence on from which the jury could legitim to the conclusion that the actual decree was 1871 and not 1872, t still remains whether the prison prepared his petition marked B, says, filled in the date in this reference to the copy decree mar in fact making a false represent Judge has remarked that the pris first time has said in this Cour "judgment-creditor may have se "decree thus altered," that is, have sent him the copy decree A t But, whether or not the jury w as to the reason why this defen set up before, the prisoner had

Digitized by Google

have it fairly and duly considered in reference to the evidence. Now, on looking at the document A, we see at once that it purports to be a copy of an original decree and not the original itself, and there appears upon it, in the endorsement, a manifest correction of an originally wrongly written date. But no one, so far as we learn, says that this corrected date is a wrong correction. This corrected date is 7th February 1872, purporting to be the date of the delivery of the copy decree to the Vakeel, witness Brojokishore Chowdhry. It thus may reasonably be inferred that this document, when it came from the hands of the mohurrir who copied it, did bear on its face the traces of this alteration, which are now apparent; and it is possible, if there was one alteration of this kind not attributable to the accused, that there may also be others. The date of the original decree which the prosecution maintains was dishonestly altered by the accused, comes almost in the very first passage of the document. May not this alteration be due also to the hand which altered the date in the endorsement? and this suggests a question which is of primary importance to the proper trial of this case, by whom was this copy made, and what was its actual condition when it came to the hands of the accused? And we may say that there is an entire absence on the record of any evidence bearing upon this point. And not only is this so, but the absence of this evidence is entirely unaccounted for. The endorsement which has just been referred to, makes it appear that the copy document was delivered out to Brojokishore Chowdhry, and Brojokishore has been examined as a witness in this case; but not one question was put to him by the prosecution in the way of inquiring what was the condition of the document at the time when he received it from the office. He says in answer to a question as to the condition of the document when it was last brought to him, as he said it was, by the prisoner for signature, that he did not look at it. But so far as we can discover, no question was put to him as to the condition of the document when he originally received it from the Court in February 1872, or, indeed, what he did with it, and how it then went from his hands into the hands of the prisoner. To repeat, we have no evidence on the record which can serve to give us any assurance as to what was the actual date of the original decree itself, neither have we any evidence to show what was the condition of this copy when it was delivered out by the officer of the Court in February 1872, or what became of it from that date until the date when it was filed by the prisoner for the purposes of the last execution.

There is also a second endorsement upon the document, the true meaning of which is perhaps not quite easy of ascertainment, but which certainly leads us to suppose that either this copy document itself or some document from which it was copied, had been in the hands of several people before this occurrence took place. If the absence of all evidence upon this very material part of the case had been distinctly pointed out to the jury, probably they would have hardly come to the conclusion adverse to the prisoner which is implied in their verdict, namely, that the document was not in its present condition at the time when he had it in his hands for the purpose of preparing the petition for execution. And if it be assumed that the document was at that time as it now is, then the unsatisfactory character of the answers and of the excuses which he gave, when questioned upon the point, does not really tell against him and the defence which he sets up that in writing out the petition he only took his materials from the document which was before him, is a true and valid defence. We need hardly add, because the Judge in his charge to the jury has himself remarked upon this point, that the absurdly patent character of the alteration which is supposed to be the forgery does tell considerably in favor of the prisoner, and when taken in connection with the absence of the evidence which has just been indicated, would probably have served to confirm the jury in a disinclination to convict upon the materials which are now before the Court. Not only was this supposed forgery or fabrication clumsy in its character and one which could not be expected to escape discovery, but it was truly without an adequate motive, because, even if the date were left unaltered, it would seem that the application was within time.

On the whole, it seems to us that there has been material misdirection of the jury in this case both in the way of omission and commission. And the verdict which has been arrived at under this direction cannot safely be allowed to stand. We therefore set aside the conviction and the sentence, and we think that the accused should be set at liberty so far as this charge is concerned. Also the fine must be remitted, and if it has been already paid it must be refunded.

Digitized by Google

The 22nd January 1875.

Present :

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Confession—Co-prisoner—Evidence—Act I of 1872 s. 30.

The Queen

versus

Naga and others (Appellants).

Committed by the Assistant Magistrate and tried by the Sessions Judge of Sylhet on a charge of committing Dacoity.

The confession of co-prisoners cannot, under the Evidence Act I of 1872, s. 30, be treated as evidence of ordinary character not distinguished by any special infirmity or qualifications against the other prisoners, as in addition to the infirmity inherent in an accomplice's testimony, they are not given on oath and are not liable to be tested by cross-examination.

Phear, J.—In this case twelve prisoners have been convicted of dacoity and sentenced each to seven years' rigorous imprisonment, and also each to pay a fine of one hundred rupees, and in default of payment to imprisonment for two years more.

Of these prisoners, Sevaluck and Demaree were captured in a somewhat remarkable manner the day after the occurrence of the dacoity, and subsequently made confessions of guilt. And a third man, Bachoo, as also Demaree already mentioned, were recognised at the time when the dacoity was being committed by Gopee Nauth, one of the sons of the prosecutor, but none of the other men were recognised by any body. And the evidence against them is entirely circumstantial; except so far as the confessions of Sevaluck and Demaree can be spoken of as evidence against them. There are passages in the judgment of the Sessions Judge, which seem to indicate that he treated these confessions as evidence of ordinary character, not distinguished by any special infirmity or qualification, even as against prisoners other than those who made them.

He says, "that the confession made by "Sevaluck and Demaree are receivable as "evidence in this case; there is "that undue influence was brough "on them; they could not ha "prompted by any one in this part "to describe people living in Arrah and, again he says, speaking of the prisoners, that all of them have "bee "nised by one or more of the witnes "I see no reason to discredit *that e* "backed up as it is by the *two confes* The recognition to which the Judg refers is not recognition by any one was an eye-witness of the occurrence dacoity, but recognition by witnesse say that they saw persons in custo days after the date of the dacoity, cognise the prisoners as being some persons.

In using the words which hav quoted from the judgment, the Judg to consider that the confessions m Sevaluck and Demaree were of equ in the way of evidence against all th prisoners as against these two me selves. At any rate he has not dis his judgment that he was aware of t peculiar kind of evidence which th fessions furnish under the Evidence strictly speaking, it can be rightly evidence as against the persons who make them.

This Court has already had occ more than one case to point out t fessions which are made use of under 30 of the Evidence Act, in the fir can only be so used, so far as th the confessing prisoner guilty of the for which all are being tried, and, s cannot stand higher than the evidenc accomplice. It has also been expla what respect an accomplice's testim quires to be corroborated before ev can be rightly relied upon against the persons. And it is obvious that th fessions of co-prisoners are character a very serious infirmity as regards t soners against whom they were sough used under Section 30 of the Evidenc In addition to the infirmity inherent accomplice's testimony, *i. e.*, they are sanctioned by an oath, nor can th tested, developed, or explained by examination. And when we look words of the Section 30 itself, we f the Legislature avoids saying that sions of this sort are *evidence*, c be used as evidence as against other than those who made them;

Digitized by Google

nerely the Court may *take into consideration* such confession as against such other person as well as against the person who makes such confession. It is, we conceive, generally unsafe to use materials of this character against persons under trial without carefully bearing in mind its special infirmity of character.

And judging from the language which the Sessions Judge has used, we cannot help thinking that he has, in the present case, attributed more weight than he ought to the confession of Sevaluck and Demaree as against the other prisoners. However, after carefully considering the whole of the evidence in the record, we think that it does make out a case against all the prisoners, as well as against those who did not confess and who were not recognised at the time of the dacoity as against the other three.

It has already been remarked that, with the exception of the two confessions, the evidence against the prisoners is entirely of a circumstantial character. The circumstances referred to may be shortly stated as follows:—The dacoits were all or almost all of them *Hindoostanis*. This seems to be beyond all doubt. The witnesses who speak to the dacoity state positively that they perceived at the time that the dacoits were up-countrymen, and in the pursuit of these men, which was commenced the next morning they deliberately set themselves to discover the dacoits by this peculiar characteristic. The men who were almost immediately arrested were in the first instance apprehended because they bore the character of up-countrymen or Hindoostanis, and were unmistakeably distinguishable from the inhabitants of that part of the country, Eastern Bengal, who are Bengalis.

They formed a party of Hindoostanis who were found by the pursuers travelling along the highway which led from the prosecutor's house, and were at once rightly or wrongly arrested on the charge of having committed the dacoity, and a small quantity of the plundered property was found in the possession of some of them.

Next, these men after having been kept in custody some hours, all, with the exception of Sevaluck and Demaree, escaped from their captors and absconded. Some weeks afterwards, about two months, on the strength of information which was afforded by Sevaluck and Demaree, the prisoners, other than these two, were apprehended in zillah Arrah, and on being taken to the place of the dacoity were recognised by the witnesses who have given their testimony to this effect in the Sessions Court as being the men who were originally arrested on the day after the dacoity; and lastly, we have it that all these men, with the exception of Sevaluck and Demaree, deny that they were among the persons who were so arrested.

To these may be added another circumstance which is not without some force, namely, that the original capture of the Hindoostanis was effected in two parties, and Sevaluck was taken in one of the parties, and Demaree in the other.

We have, on the foundation of all these circumstances taken together, a very strong *prima facie* case against the prisoners, which is confirmed by so much of the confessions of Sevaluck and Demaree as we are entitled to take into consideration against the different prisoners respectively, under the provisions of Section 30 of the Evidence Act. The statements of the prisoners in their defence are quite insufficient to rebut this case.

On the whole, after going through the materials which are on the record as carefully as we can, we feel that the conclusions of the Sessions Judge are supported by evidence, and that the case of the prosecution is satisfactorily made out.

We are therefore of opinion that the conviction ought not to be disturbed, and we do not see sufficient reason for abating the sentence: the appeal is therefore dismissed.

The 22nd January 1875.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Unlawful Assembly—Common Object—Act XLV of 1860 s. 141.

(Miscellaneous Case.)

Shunker Singh and others (the Pachgachia Party) *Petitioners.*

Burmah Mahto and others (the Amba Party) *Petitioners.*

Mr. Munmohun Ghose for the Pachgachia Party.

Mr. J. H. A. Branson for the Amba Party.

No charge of being members of an unlawful assembly under s. 141, Penal Code, can be sustained, where the intention of the parties was, not to enforce a right or

Digitized by Google

supposed right, but to maintain undisturbed the actual subsisting enjoyment of a right which was at that time being exercised.

Phear, J.—We think that the conviction in the case of the Pachgachia people must be set aside, because it seems to us, upon the findings of fact to which both the Lower Courts have come, that the conviction cannot be sustained.

The Magistrate says, that he thinks the evidence makes out against the defendants a charge under Section 141 of the Indian Penal Code, their common object being to enforce a right or supposed right to clear out the Rajdhar. He then sets himself to state the facts as he finds them from the evidence, and after discussing the character of the evidence, he says: "The true ex- "planation of the case appears to me to be "this, that Ramdhon and others, from Pach- "gachia, went to see that no one interfered "with the passage of their water, intending, "if necessary, to use force, as they could "hardly expect that verbal remonstrance "would be of much effect, and then the Amba "people came to stop the water with a like "intention, whereupon a disturbance ensued, "and on two of the Pachgachia people being "somewhat severely hit, both parties retired, "being afraid that the two men were killed."

This conduct, taken with the intention which the Magistrate ascribes to the Pachgachia people, is not necessarily in itself unlawful. It does not fall within the 4th Clause of Section 141 under which the Magistrate has framed his charge. That clause defines an assembly to be unlawful if the common object of the persons composing it be, by means of criminal force or show of criminal force to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right. According to the statement of facts made by the Magistrate, the Pachgachia people were not animated with the intention to enforce a right or supposed right, but to maintain undisturbed the actual subsisting enjoyment of a right which was at that time being exercised. They went to see that no one interfered with the passage of their water which was then flowing, that is, that no one disturbed the enjoyment of the right to take water which they were then having at that time.

Every one has a right to protect himself in the actual enjoyment of his property, and in the actual exercise of his right case be such that the 3rd Clau 99 of the Penal Code applies; there is time to have recourse i protection of the public authori case there is no right of pri The Magistrate, no doubt, says, right of self-defence of property "think, considering the police "only two miles distant, that th "sufficient to justify the reso but he comes to no finding a the Pachgachia people were intention on the part of their interfere with the passage of which they themselves went necessary. Although the outp two miles off, it might be that t not time to send for and get the the police soon enough to a coming of their adversaries. any rate the right to go to the selves, and at most they would refrain, even in their own defenc force against the other side un authorities could come up, circumstances were such tha might have been brought upon time. They were not bound u cumstances to stand quietly by, opponents wrongfully and by for serious mischief. On this part there is no such finding as woul to take away from the Pachgach right to protect themselves, whil actually in the exercise of a right, and therefore it appears whole, taking the facts as f Magistrate, that the conviction Pachgachia people cannot be sus

With regard to the second that of the Amba people, that se entirely different one. The Ma that they came to stop the wate of force if necessary, and this w to interfering with the actual a right by the Pachgachia peopl them out by force from the enjo use of the water which they we the very time. On these facts, t assembly of the Amba people be ful under the words of the 4t Section 141.

We were told by the learned argued the case on behalf of the ple that the Magistrate came to with regard to the nature of th object; but we find that this There is the distinct finding whi

Digitized by Google

been read out. Therefore, we are of opinion that we ought not to interfere with the conviction in that case. Neither do we think that there has been any such error made on the part of the Courts below with regard to the identification of certain persons named amongst the Amba people as would justify us in interfering in the matter. There is evidence on the record which distinctly points to these persons as being not only members of the unlawful assembly, but as actually taking a foremost part in it, and we cannot say that the way in which the Lower Courts have dealt with that evidence and the other circumstances bearing upon the point is such as to vitiate the finding of fact at which they arrived.

The conviction and sentence as regards the Pachgachia people must be set aside, and they must be set at liberty so far as this charge is concerned, and the fine, if paid, must be remitted.

The 26th January 1875.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Factory Books—Evidence—Act I of 1872 *s.* 34.

The Queen

versus

Hurdeep Sahoy, *Appellant.*

Committed by the Magistrate and tried by the Sessions Judge of Sarun on a charge of committing criminal breach of trust.

Mr. M. L. Sandel for Appellant.

Mr. R. T. Allan for the Prosecution.

Factory books cannot be used as independent primary evidence of the payment to which the entries refer;—Act I of 1872 s. 34.

Phear, J.—THE prisoner has been tried and convicted in the Sessions Court upon two charges: the first of which is "that he, "between the months of April 1871 and June "1873, or thereabouts, committed criminal "breach of trust in respect of the sum of "Rs. 2,236 odd, entrusted to him for pay-"ment of rent of Etwa ghat, by the manager "of the Suraha factory."

2ndly.—"That he, on or about the 10th "April 1873, committed criminal breach of "trust in respect of the sum of Rs. 281 "4 annas, being a portion of a sum of Rs. 681 "4 annas, sent to him by the manager of the "said factory for deposit with Government "on account of the said ghat."

We think that the first charge is too vague, and the prisoner might well have objected to being tried upon it unless the prosecution pledged itself to establish much more definitely and specifically than is mentioned in the charge the dates of the receipts of the different sums of money which he was accused of embezzling, and gave him reasonable notice thereof. It is not fair to lay a criminal charge in such large terms as these against a man who has been continuously, for a long period, entrusted with money, and thus to call upon him without specification of the items to account in a Criminal Court instead of a Civil Court for the monies which he has received. However, the prisoner did not, so far as we can discover from the record, complain of the generality of the charge, and to some extent no doubt the defect was amended by the production of a certain petition of complaint filed by the prosecutor before the committing officer, which specified the various items of money alleged by the prosecution to have been paid to the prisoner; and we may take it perhaps that substantially the prisoner has been tried upon the footing of this petition. He has in this way had distinct notice of the different items, the receipt of which the prosecution would endeavour to establish against him at the trial, and was therefore, we suppose, as reasonably well prepared to meet them as he could be under the circumstances of the case.

Now, upon reference to the evidence in the record, we find that, in respect of a considerable number of these items, the prosecution did not produce any evidence of the payment of the corresponding sums of money to the prisoner other than the evidence which the Sessions Court supposed was afforded by the books of the prosecutor's factory. We need hardly now remark that these books could not be used as independent primary evidence. Section 34 of the Evidence Act says:—"Entries in books of account regular-"ly kept in the course of business, are "relevant whenever they refer to a matter "into which the Court has to inquire, but "such statements shall not alone be sufficient "evidence to charge any person with "liability."

Digitized by Google

The Sessions Judge in his judgment has apparently treated these books of account as if they were substantive evidence against the prisoner in all respects. At any rate, having arrived at the conclusion that the payments entered in many of the items of the book were corroborated by other evidence, he raises thereon the inference that even the entries which were not so corroborated were accurate; in other words, afforded good substantive evidence of the payments to which they refer. This is, we think, an error on his part. So far as payment of money was deposed to by the witnesses who paid it, or was evidenced by the prisoner's written receipt, the entries in the account books could be taken as corroborative evidence. But the remaining entries in the account books could not rightly be used, regard being had to the terms of the Evidence Act, to fix criminal liability upon the prisoner until there was substantive evidence independent of them, tending to show that he had received the monies which were the subject of them. This being so, the case of the prosecution stands very ill supported upon the record. Out of all the items of payment to the prisoner, there is only a limited number of them which are supported by the evidence of payment which I have just now referred to.

The answer which the prisoner makes to the allegations of the prosecution is shortly this,—namely, that whatever monies he received he paid over into the Collectorate: and he appeals to the Collectorate books as evidence of what he so paid in. And he says, shortly, that he received no other monies than the monies which so appear to have been paid into the Collectorate.

Most of the items which the peons and other witnesses speak to as having been paid into the hands of the prisoner, and which are covered by the alleged letters of the prisoner, do find a place in the Collectorate books. But there is one instance undoubtedly, if not more, in which the item evidenced by a letter said to be signed by the prisoner himself is not represented by any corresponding entry in the Collectorate books. If we ought, on the evidence before the Court, to consider the fact of payment of this item of money to the prisoner as satisfactorily made out by the evidence, then, inasmuch as the burden in a case of this kind unquestionably lies on the accused person to account for the money which has been proved to have reached his hands, the fact that the prisoner only appeals for his defence to the Collectorate books, and that those books do not in this instance the corresponding item serve to establish the case of the pro so far as regards this item.

But we are not prepared to come conclusion upon the materials whic the record for several reasons. [Th then entered at length into a consider the evidence on the record, *and* acquitted the prisoner of the charge lai

---

The 28th January 1875.

Present:

The Hon'ble J. B. Phear and G. G. *Judges.*

Perjury—False Evidence—Magistrate's —Charges—Evidence—Act X of 187 *—Act I of* 1872 *s.* 91.

The Queen

versus

Mungul Dass, *Appellant.*

Committed by the Assistant Ma and tried by the Sessions Judge neah, on a charge of giving false in a stage of a judicial proceedi

Mr. M. M. Ghose and Baboo K Mohun Dass for Appellant.

In a case of giving false evidence, the Eng written by the Magistrate was put in to prove accused had stated before him. The docu not interpreted to the accused in the language it was given, or which he understood; nor w over in accordance with requirements of s. 33 Criminal Procedure in the presence of the pe accused:

HELD, that the English record of the Magis not legal evidence under the Evidence Act, I s. 91, of what the prisoner said before the Magi

Charges of perjury ought to be based stric the exact words which are used by the pers charged; and no evidence which does not prof those exact words can alone be a safe founda conviction.

Phear, J.—THE prisoner has been ed upon a charge of perjury for havi "the 14th April 1874, at Purneal "Mr. H. P. Mulock, Assistant Ma

Digitized by Google

"in the course of an enquiry into a case "triable by the Court of Sessions, against "Bawan Dass and eleven others, stated in "evidence 'none of my servants ever made "a single complaint against Gureeb Dass,' "which statement you either knew or "believed to be false, or did not believe to "be true."

The prisoner's defence to this charge was, that "the record made of my testimony was "incorrectly taken down; what I meant to "say was that my servants had never brought "any complaint against Bawan Dass. I had "no opportunity of correcting the record of "my evidence, because the original record "taken in English was not read over to me. "I had no intention to say anything with "reference to charges being brought against "Gureeb Dass. I could have none, because "Gureeb Dass was dead. The cross exa-"mination was addressed to discovering "whether I was in enmity with Bawan "Dass, who was the principal accused, as "will be seen by my deposition both before "and after. I therefore say that this charge "is founded entirely on mistake."

To support the charge, and to prove that the accused actually spoke the words which are alleged in this charge at the time and on the occasion mentioned therein, the prosecution put in the English record written by the Magistrate himself, Mr. Mulock, of that which the accused stated before him. But we find that that document was not made according to the conditions which are prescribed in the 25th Chapter of the Criminal Procedure Code; in particular, although it was taken down in a language different from that in which the evidence of the present accused person was given, and it is admitted that he does not understand the language in which it was taken down, it was not interpreted to him in the language in which it was given or in the language which he understands. It is true that there is nothing to show that the accused required this to be done. But neither was the other alternative which is prescribed by the first part of Section 339 conformed to, because it was not read over in the presence of the person who was then accused. Instead of this course being taken, another and a totally different document was read over to the witness in supposed conformity to the first part of Section 339. That document was an *Urdu* account of what the witness had said, taken down by the mohurir of the Court simultaneously with the record which the Magistrate himself made in English, and this *Urdu* account forms no part of the Magistrate's record. For this reason it seems to us that the English record of the Magistrate was not properly receivable in evidence as constituting the legal evidence under Section 91 of the Evidence Act of that which the witness said before the Magistrate, Mr. Mulock. And if the trial in the Sessions Court had ended with the evidence which was adduced by the prosecution, the Court ought to have held that there was no case legally established against the accused.

However, the accused in his defence put in the *Urdu* document which has just now been referred to, and no doubt, after having done so, he cannot be heard to say that that document does not afford evidence of that which he stated before the Magistrate. He put it in himself as being a representation of what he had said; and it must therefore be taken for as much as it is worth against him. So far as we are informed, for unfortunately the document itself does not appear upon the record, there is a passage in it which represents the accused to have said that none of his servants made any criminal charge against Gureeb Dass. And this passage, taken alone, probably would substantially support the charge upon which the accused is now tried, although it is not proved that he used the precise words which are set out in the present charge. But we observe that the substance of the prisoner's defence is that what was taken down as his statement in this particular was taken down by mistake; that he never had in fact said that his servants had not brought a single criminal complaint against Gureeb Dass; but when he answered the question which was put to him, he was speaking in reference to the accused, who was then before the Court, namely, Bawan Dass. And it thus becomes important to consider what was the degree of accuracy observed by the officers of the Magistrate's Court in taking down the evidence. For this purpose we ought to have had the whole of the *Urdu* deposition before us. It would have been most important that we should have been able to compare this particular passage with the rest of the context. It might possibly have been apparent upon an inspection of the context that in this passage the name Gureeb Dass was in all probability a mistake. It is not by any means improbable that the answer which preceded and succeeded this particular passage might have given us a clue to the true solution of this question.

But, moreover, it seems to be almost certain, although we have not the *Urdu* document

Digitized by Google

itself before us, that it was full of corrections.

Rung Lall, the mohurir who took it down, was called as a witness by the accused. And in his evidence he has given a reason for the numerous corrections which he seems to have admitted were apparent upon the face of the document. According to his explanation he first took down the answer given by the accused to the Magistrate's question, and then upon the Magistrate putting a second question directed pretty nearly to the same point or to the illustration of the answer already given, he did not take down the second answer, but corrected or altered the first answer in such a way as to make it represent the combined results of the two questions. This seems to be the result of the explanation given by Rung Lall of the various alterations and corrections said to be apparent on the document: and if it be so, then plainly the document itself is not a trustworthy record of the precise words which the accused actually did utter in his examination. Charges of perjury ought to be based strictly upon the exact words which are used by the person who is charged. And no evidence which does not profess to give those exact words can alone be a safe foundation for a conviction.

It seems then that, in the present case, we have in the Magistrate's English record no legal evidence of what the accused person did say before Mr. Mulock, and in the vernacular taken down by the mohurir we have a record which is by its very nature, under the explanation given by the mohurir himself, most untrustworthy as a representation of the accused's statement. And further still, inasmuch as we have not got that document itself before us in its entirety, but only extracts from it which are given by the Magistrate in his judgment, we are unable to form our own opinion as to the probability of the allegation which the accused makes to the effect that the passage relied upon by the prosecution was a mistake.

On the whole we think that the prisoner ought not to be convicted upon the evidence which is on the record. We are of opinion that it forms too weak a foundation to base a conviction of perjury upon. Accordingly we direct that he be acquitted, and the conviction and sentence set aside, and he must be set at liberty so far as the present charge is concerned.

The fine must be remitted. If it has been paid, it must be refunded.

The 29th January 18

Present:

The Hon'ble J. B. Phear and
Judges.

High Court—Jurisdiction—Prop
Government—Act X of 1872 *ss.*

Reference to the High Court, u
296 *of the Code of Crimina*
by the Sessions Judge of Bh

Ghumundee Singh, *Petit*

Baboo Nil Madhub Sein for th

The High Court declined, on a refer
tion 296 Code of Criminal Procedure, t
the order of a Magistrate rejecting an ap
restitution of property which had been s
ago under the provisions of ss. 183
Code. The proper mode of raising the
the propriety of the order would be by
against the Government.

Reference. — THE Magistrat
notice of the attachment of the gr
made without previous proclama
the subsequent proceeding under
property was made over to third
whom it appears to have been app

In dealing with the question of z
the Magistrate again avoids th
of legality of the attachment
made in May 8th, 1866, and there
the issue of the proclamation,
not regularly issued till March 25t

The Magistrate holds that the
of the *huq intifa*, or right to
extended to the sums lent by G
Singh to the proprietors, in consid
which he obtained the estates in fa

In other words, that the inter
money lent having been secured to
dee Singh by making over to
profits or usufruct of the estates,
rights of Ghumundee Singh in tha
having been attached, the prin
interest of which the usufruct was
to secure, was attached also.

Digitized by Google

The first attachment, without previous proclamation under Section 183 Act XXV of 1861, was invalid, and the subsequent order manifestly illegal. The Magistrate ought to have taken up the point and admitted the illegality.

For the same reason the attachments of the usufruct made in May 1866 were invalid, and are no attachments at all. Nor can the Magistrate's reference to them, when he at last issued the proclamation required by law in March 1868, render such attachments valid.

The Magistrate, when he discovered the irregularity in the issue of the former proclamation, and in 1868 issued a proclamation in accordance with Section 183, was bound to proceed *de novo* under that proclamation by issuing fresh attachment; and by his neglecting to do so, and by his contenting himself with a mere reference to the former proceedings, he rendered his order of confiscation inoperative.

As no property of Ghumundee Singh was attached simultaneously with or subsequent to the proclamation, and as that property only which is under attachment can be declared to be the property of Government, it follows in this case that none of the property of Ghumundee Singh is liable to confiscation.

As regards the latter part of the Magistrate's order it appears to me that if, as no doubt was the case, the usufruct of these estates was made over as security for the payment of interest on a loan, the attachment of such usufruct is only an attachment of the profits, and of nothing else, and that attachment cannot be held to extend to the original loan.

As this Court has only to deal with the legality or illegality of the confiscation order, it is useless going into the details of the special case, where the rent of the estate was paid out of the zur-i-peshgee. If the confiscation order is set aside, this question can be more satisfactorily decided by the Civil Court, before whom, unless a compromise is effected, a claim will probably be preferred.

Judgment of the High Court.

Phear, J.—We think that there has been some misapprehension both on the part of the Judge and of the present applicant in the matter of this reference. We are asked to set aside an order of the Joint Magistrate, which was made on the 17th January 1873, dismissing a certain petition made to him.

That petition is unfortunately not among the papers which have been sent up to this Court, and we are therefore, strictly speaking, not in a position to judge of its purport. But according to the judgment of the Joint Magistrate which is objected to, the present applicant, by that petition, claimed the restitution of certain property which Government had attached and sold some years ago under the provisions of Sections 183 and 184 of the late Criminal Procedure Code. Now if this be the real scope of that petition, the refusal of the Magistrate was merely a refusal on the part of the Government to give up the property which had been rightly or wrongly appropriated by the Government. And it is impossible for us on a reference of this kind to entertain and determine any question as to the propriety of that refusal. The proper mode of raising such a question as that would be by a regular suit brought against the Government.

The grounds upon which it is said that refusal is bad and wrongful, seem to be these: that the original attachment and sale of the property were for certain reasons invalid, and not effective to pass the present applicant's property to the Government. Whether this be so or not, we cannot now consider; those proceedings have not been brought before us to be quashed. And probably, regard being had to the length of time which has elapsed since the orders in these matters were made, it might be difficult for the applicant to satisfy the Court that they ought to be quashed. It is enough for us to say at present that these proceedings are not rightly before us. And we are therefore unable to entertain any question as to whether they ought to be quashed or not.

We may further add that as long as the order for attachment and sale remain intact, it is difficult to see how the Joint Magistrate could do otherwise than refuse the application of the petitioner for the restitution of the property. It was not in his power to quash those proceedings, and the utmost that he could have done would have been to transmit the application which had been made to him to superior authorities for consideration of the Government. He had no power to act in the matter as a judicial officer.

With these views we think we are not in a position to pass any order in the matter of this reference, and therefore the papers must be returned to the Judge.

Digitized by Google

The 30th January 1875.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

False Charge—Information—Evidence.

The Queen.

versus

Hoolas *alias* Suttoo, *Appellant.*

Committed by the Magistrate, and tried by the Sessions Judge of Purneah on a charge of instituting a false charge of an offence with intent to injure.

Where the charge is one of instituting a false charge of an offence with intent to injure, the actual information which the prisoner made at the thannah ought to be given in evidence and form part of the record.

Phear, J.—We have given our best consideration to the evidence in this case, and we are of opinion that the conviction must be sustained.

We feel bound, however, to remark that the actual information or charge which the prisoner made at the thannah ought to have been given in evidence in this case and made part of the Sessions' record. The evidence of the Darogah, no doubt, shows that the information was given at the thannah by the prisoner, as alleged on the part of the prosecution, and this information must have been taken down in writing. But we do not find it any where in the Sessions' record; and in the place of it, the Darogah is allowed to speak from the contents of his diary.

It does not seem to us, however, that the prisoner has been materially prejudiced in his defence by this shortcoming on the part of the prosecution, because in his statement which he made before the Magistrate, he distinctly admitted that he made the report at the thannah that the boy had been killed by Nawabia, and that he knew at the time that he did so that the boy had died of natural causes, and that this charge made against Nawabia was false.

Before the Sessions Court also he made statements which confirmed the statements before made by him to the Magistrate, although he then endeavoured to shift the blame upon Danoo, the mother of the boy.

On the whole we have no doubt that he has been rightly convicted of having made a false charge, and that he is therefore liable to punishment under Section 211 of the Penal Code. At the same time we think that the sentence which has been passed upon him is unnecessarily severe; accordingly we reduce it to two years' rigorous imprisonment.

The 3rd February 1875.

Present:

The Hon'ble F. A. Glover and H
Chunder Mitter, *Judges.*

Trial by Jury—Heads of Charge—St
Judge—Act X of 1872 s. 464

The Queen

versus

Kasim Shaikh, *Appellant.*

Committed by the Magistrate, on the Additional Sessions Judge 24-Pergunnahs, on a charge of c culpable homicide not amou murder.

Held that the words in s. 464, Code Procedure, that in trials by jury "heads" o "charge" are to be recorded, must be construe and include such statement on the part of Judge as will enable the Appellate Cou whether the evidence has been properly l Jury, or whether there has been any misdir charge.

Glover, J. — The Officiating Judge not having, in his "heads to the jury," given us any intimati way in which he summed up the and as an erroneous summing up evidence would be a misdirection t which would form a good ground on a point of law, we have been go through the record and to treat as an ordinary appeal from a judgm in a trial held with the aid of We are of opinion that the e reliable, and that upon it the pris might have been properly convic Section 302, instead of under Sect

The appeal of the prisoner i accordingly.

We desire to bring to the noti Officiating Sessions Judge that " charge," as given in the case, afford ance whatever to the Appellate Cou the correctness or propriety of th We ought to be in a position to k the statement of the Judge to the and whether the evidence was before them.

The new Procedure Code, no Section 464 says that in trials by "heads" of the Judge's charge recorded; but these words must strued reasonably, and must be held

Digitized by Google

such a statement on the part of the Sessions Judge as will enable the Appellate Court to decide whether the evidence has been properly laid before the jury, or whether there has been any misdirection in the charge. In fact, Section 255 of the Code makes distinct mention that a statement of the Judge's direction is to be attached to the record.

The 6th February 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Opium—Confiscation—Summary Trial—Procedure—Act XXI of 1856—*Act X of* 1872 *s.* 148.

Reference to the High Court under Section 296 *of the Code of Criminal Procedure by the Sessions Judge of Hooghly.*

The Queen

versus

Jodoonath Shaha.

On a conviction under Act XXI of 1856 of having in possession opium not supplied from the Government stores, the Magistrate tried the case summarily under s. 222, Code of Criminal Procedure, and passed a sentence of fine, or imprisonment, and confiscation of the opium. HELD that the case could not be tried summarily, the additional sentence of confiscation not coming under s. 148, Code of Criminal Procedure.

Reference.—THE accused Jodoonath Shaha, a licensed vendor under Act XXI of 1856, has, in a summary trial held under Chapter XVIII of the Code of Criminal Procedure, been convicted of having in his possession opium other than that supplied from Government stores; and has, under Section 53 Act XXI of 1856, been sentenced to fine of Rs. 100, or in default to four months' imprisonment with confiscation of the opium.

The Joint Magistrate has tried the case summarily under Section 222 of the Code of Criminal Procedure, because he has considered it a summons case,—that is, regarding an offence referred to in Section 148 of that Code—an "offence triable by a Magistrate and punishable with fine only."

The Honorable High Court have recently held on the 25th July last, in the case of The Queen *v.* Khetter Mohun Chowronghee,* that a similar offence under the salt law cannot be tried summarily, because the penalty of confiscation of the contraband salt is superadded to the punishment of fine; and as the same rule is applicable to the present case *mutatis mutandis*, I submit the matter for the orders of the Honorable High Court. I take this opportunity of soliciting the Honorable High Court's instructions as to the Chapter of the Code of Criminal Procedure under which such cases should be tried, as, if they are not to be classed among summons cases, and therefore triable summarily, they do not equally fall under the denomination of warrant cases, and it would seem that no procedure has been prescribed under which such cases can be dealt with.

Judgment of the High Court.

Glover, J.—The accused has been convicted, under Section 53 Act XXI of 1856, of having in his possession opium not supplied to him from the Government stores, &c., and sentenced to pay a fine of Rs. 100, or in default to suffer four months' imprisonment. The opium also was confiscated.

The Magistrate tried the case summarily under Section 222, Code of Criminal Procedure, and the case is referred to us by the Sessions Judge of Hooghly on the ground that the Magistrate acted without jurisdiction, the offence which was punishable by fine or imprisonment and with confiscation not being one which could be tried by a Magistrate summarily.

Section 148, Code of Criminal Procedure, to which the present case, if triable as a summary one, would be referrible, provides for a punishment either of fine or imprisonment or both. But the accused has, in addition to a fine, been sentenced to lose the opium found in his possession, and this punishment of confiscation is one separate and distinct from that of fine or imprisonment. Such a sentence would not come under Section 148, Code of Criminal Procedure, and the offence would not therefore be one (none of the other Clauses of Section 222, Code of Criminal Procedure, applying) which a Magistrate could try summarily.

The point has already been decided by a Division Bench of this Court in the case of Khetter Mohun Chowronghee, 25th July 1874.*

With reference to the second part of the Judge's reference, it will be sufficient for us, without pronouncing any judicial decision on the point, to refer him to Sections 71 and 72 of Act XXI of 1856 for the procedure to be followed in cases of this nature.

* 22 W. R., 43.

* 22 W. R., 43.

Digitized by Google

The 18th February 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Jurisdiction—Obstruction—Riot—Act X of 1872 *s.* 518.

Reference to the High Court under s. 296 *of the Criminal Procedure Code by the Sessions Judge of Backergunge.*

Sree Nath Dutt, *Petitioner,*

versus

Unnoda Churn Dutt, *Opposite Party.*

Baboos Rashbehary Ghose, Kashikanth Sen, and *Bussunt Coomar Bose* for the Petitioner.

A Magistrate's jurisdiction under s. 518, Criminal Procedure Code, to direct the removal of an obstruction is confined to cases where there has been annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or where there is a probability of a riot or affray.

Glover, J.—THIS is a reference from the District Judge of Backergunge recommending that the order of the Magistrate passed under Section 518 of the Criminal Procedure Code, and directing the removal of a certain obstruction, should be quashed as illegal. It appears that one of the parties to the case had obstructed a water-way by cutting down and throwing a mangoe-tree across the stream. A petition was made to the Magistrate to have that obstruction removed, and the Magistrate, under Section 518, passed the order. The Judge considers the order of the Magistrate to be illegal, and that if he proceed at all he must proceed under Section 521 of the Procedure Code. We are of opinion that the Magistrate had no jurisdiction to proceed under Section 518, inasmuch as the operation of that Section is restricted to cases where there is annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or where there is a probability of a riot or affray,—to cases in fact where time is an essential element, and in which it would be necessary to interfere at once. In the present case it is clear that there was no such necessity. The only thing complained of was that a mangoe-tree had been cut down and thrown across a small *nulla,* and that thereby the water passage was obstructed. There was no danger to life nor risk of any riot or affray, nor is there evidence that the obstruction injured or annoyed any person lawfully employed. The proceeding therefore Magistrate under Section 518 wa *vires,* and he ought to have proceede Section 521. It has been ruled in t of Banee Madhub Ghose *v.* Woom Roy and of Nunda Koomar Rai *v.* Chunder, to be found in Volumes 22 W. R., pp. 26 and 78, that on proceeding on the part of a Magistra Court can interfere under Section *15* Charter. Following those rulings, we that in this case we can declare unde Section that the order of the Magi under Section 518 was *ultra vire* should be quashed. If the Magistrate it necessary to proceed with the case f he must proceed under Section 521 Procedure Code.

The 18th February 1875.

Present:

The Hon'ble F. A. Glover and Ro Chunder Mitter, *Judges.*

Assault—Jurisdiction—Act X of 18 *ss.* 70 *&* 282.

(Motion No. 30 of 1875.)

Sheikh Moham d Golab, *Petitio*

versus

Mohabeer Singh and others, *Opposite*

Mr. M. L. Sandel for the Petitio

Moonshee Mahomed Yusoof for the site Party.

A case of assault, tried by the Assistant M of Purneah, was appealed to the Sessions Judge district, who ordered an enquiry and found assault had been committed in Maldah, and th released the accused as the Magistrate of Purn no jurisdiction:

HELD that the Judge had no jurisdiction un tion 70, Criminal Procedure Code, to make such a the accused not having been prejudiced in his c and further that he ought not to have ordered the as to the place where the assault was committe question having no bearing on the guilt or in of the accused—s. 282, Criminal Procedure Code.

Glover, J.—THE petitioner was com ant in a case of assault against Mol Singh and others, in which the Ass Magistrate of Purneah convicted the d ants, and sentenced them to various of imprisonment and fine. They app to the Sessions Judge, and the Judge, ordering a further enquiry as to the where the assault was committed, cam the conclusion that it had taken place w the district of Maldah, and that there

Digitized by Google

the Assistant Magistrate of Purneah had no jurisdiction, and the Judge released the accused on this ground. The complainant appeals to this Court on the allegation that the Judge had no jurisdiction to make such an order. Section 70 of the Criminal Procedure Code, which refers to cases of this description, lays it down that no sentence or order of any Criminal Court shall be liable to be set aside merely on the ground that the investigation inquiry or trial was held in a wrong district, unless it is proved or appears that the accused person was actually prejudiced in his defence, and so on. Now there is no question of the accused having been prejudiced in their defence by the Assistant Magistrate's action, nor did they ever raise an objection before him on the ground that the offence had been committed within the district of Maldah, and not in Purneah. And the Judge ought not to have interfered with the conviction on that ground. Under Section 70 he was bound to decide the appeal on the merits.

Another objection taken is that the Judge's order of remand to enquire as to the place where the assault was committed, not having any bearing upon the guilt or innocence of the appellant, was not provided for by Section 282 of the Criminal Procedure Code, which Section restricts further enquiry and evidence to matters bearing upon the guilt or innocence of the appellant. The question as to whether the spot of ground on which the assault took place was in Maldah or Purneah had no bearing whatever upon the merits of the case; and the further enquiry should not, we think, have been made. The case must be sent back to the Judge in order that he may decide the appeal upon the evidence taken by the Assistant Magistrate, and say whether the conviction was a proper one or not. The petitioner has undoubtedly the right to have that point decided.

The 21st December 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Police Officer—Evidence—Jury—Act X of 1872 s. 32 cl. 8.

The Queen

versus

Ram Dutt Chowdhry, *Appellant.*

Committed by the Magistrate, and tried by the Sessions Judge of Tirhoot, on a charge of using as genuine a forged document knowing it to be forged.

Messrs. J. T. Woodroffe and *C. Gregory* and *Baboo Chunder Madhub Ghose* for Appellant.

Mr. W. Jackson and *Baboos Juggadanund Mookerjee* and *Nilmadhub Bose* for the Prosecution.

The statement of a Police officer who goes about from place to place and collects information from different persons, which he afterwards puts in second hand before the Court, cannot be received as evidence under the Evidence Act I of 1872, s. 32, cl. 8. The meaning of that clause is that, when a number of persons assemble together to give vent to one common statement, which statement expresses the feelings or impressions made in their mind at the time of making it, that statement may be repeated by the witnesses, and is evidence.

In forming a Jury, a Sessions Judge should endeavour to seek for persons of an independent condition in life, men of judgment and of experience.

Jackson, J.—THE appellant in this case is charged under ten separate heads of charge, the first being under Section 471 read with Section 467 which imputed to him forgery of a document which ought to have been described as a valuable security; the second under Section 471 read with Section 465 charging him with using as genuine a forged plaint; thirdly, under Section 209 charging him with preferring a fraudulently false claim; fourthly, under Sections 466 and 109 for abetting forgery of a vakalutnamah; fifthly, under Sections 471 and 467 for using as genuine in the appeal Court of the Additional Judge the alleged forged bond referred to in the first charge; sixthly, for using a forged plaint in the same Court; seventhly, for setting up the previously mentioned false claim in the Appellate Court; eighthly, with having set up one Bhagbut

Digitized by Google

Thakoor and instigated him falsely to personate one Rung Lall Jha; ninthly, with having caused that Bhagbut Thakoor to make a false statement that he was Rung Lall Jha; and tenthly, with instigating the same Bhagbut falsely to state that he had instituted a suit against Rajaram. On all these charges, the appellant has been convicted by the Sessions Judge of Tirhoot, in opposition to the opinion of the assessors who were pleaders of that Court, and sentenced to transportation for life and a fine of Rs. 5,000.

It appears that, on the 19th February 1873, a plaint was filed in the Court of the Moonsiff of Mudhoobunee, in which the plaintiff was described as Rung Lall Jha of Bihinuggur, the defendant being one Rajaram Gope, and the suit being for the recovery of Rs. 395 principal, with a further sum of interest, said to be due on a bond. On the 22nd April following, the defendant put in a written statement in which, after what may be called the customary pleas, he denied the owing of this money and distinctly stated that the plaint and the suit originated in the machinations of the present appellant Ram Dutt Chowdhry. On the 17th July the Moonsiff gave judgment dismissing the suit. In that judgment the Moonsiff expressed a very distinct opinion that the suit was fraudulent and had been entirely promoted and carried on by Ram Dutt Chowdhry. On the 11th August 1873 an appeal was filed in this suit. That appeal was referred on the 17th of the same month to the Additional Judge. There the appeal seems to have rested some time, and, in the month of November, a person who was described and who claimed to be Rung Lall Jha of Mukrunda, made his appearance in a room used by the pleaders near the Judge's Court in Mozuffurpore, and excited the attention of persons who were there by crying out that a false suit had been brought in his name with which he had no concern, that he had never lent the money claimed in that suit, but that this was all the doing of Ram Dutt Chowdhry. There were several gentlemen Bengalees who were pleaders in large practice present in that room, some of whom, if not all, had often been the legal advisers of Ram Dutt Chowdhry. These gentlemen sent for Ram Dutt, and in his presence Rung Lall renewed the statement which he had made, that he had no concern with the suit or the appeal in question, and that Ram Dutt was responsible for them. Ram Dutt, according to the evidence of all the vakeels who were present, appears to have been confused, and was apparently out of coun
made no remark, did not atte
what Rung Lall asserted, neith
identity nor controverted wh
Thereupon, some of the vake
suggestion that, if Ram Dutt h
was stated, as he was watched b
his, of whom I shall speak pre
better extricate himself from th
paying the costs of one or both
this, Ram Dutt appears to h
Rung Lall, after having made
statement, followed it up on the
by a petition in the Additional J
in which he repudiated the cl
the suit and referred to Ram
originator of it. Upon that,
Judge made the order that t
placed on the record, and the pe
some respectable persons to
Rajaram, the respondent in the
the same date a correspondin
prayed for enquiry. On the
the case came on before the Ad
who noticed the fact that t
Rung Lall, described himself
dent of one place, while the pla
to have lived in another. He, he
ed an enquiry in the matter c
After this the appellant, Ram
to have had some further conv
the pleaders, and was asked by
in fact there was any other Run
had been told he had better
Rung Lall. On the 14t
another person, also called R
introduced to the pleaders.
the Additional Judge examin
Lall who had appeared before h
pleaders, and on the 16th exam
tear named Ram Gobind Sul
acted on behalf of the appellan
two things noticeable in this
that although it was quite pos
rival Rung Lalls were neve
The second is that, althoug
was mixed up in so very unp
in this matter, he does
have been summoned or requir
The Additional Judge's mohuri
Abdool Ruhman, says that th
an order for Ram Dutt's att
also says that an etlanamah
effect, but no such etlanamah is
At any rate Ram Dutt did not
the 18th December the Add
made a roobocary, in which he
the case should go for enquir
Magistrate. Rung Lall who a

Digitized by Google

pleader's room and afterwards in the Additional Judge's Court, was bound over to attend, but he disappeared and has not been seen since the evening of the 17th December. Strange to say that the other Rung Lall who immediately upon his appearance in the Additional Judge's Court was identified by several persons, who said they knew him as being one Bhagbut Thakoor, has also disappeared.

In the sequel Ram Dutt, the present appellant, and Rung Lall the second, who was up to that time present, were sent before the Magistrate after an enquiry which began in December 1873. On the 1st June 1874 Ram Dutt was committed for trial. The trial commenced on the 21st July. Charges were framed by the Sessions Judge on the 24th. The assessors delivered their opinion on the 11th August, and the Sessions Judge delivered his judgment on the 15th August sentencing Ram Dutt, as I have already said, on all the counts, to transportation for life and a fine of Rs. 5,000.

Ram Dutt's answer to the case brought against him was that he knew nothing of the plaint, or of the bond, or of the case, until after the judgment of the Moonsiff, when he says Rung Lall called upon him stating that he had lost a case in the Moonsiff's Court, and, that in his judgment, the Moonsiff seriously impeached the character of Ram Dutt himself. Thereupon he introduced Rung Lall to a mookhtear whom he sent for, and that that was the whole of his connection with the case. He maintains that Rung Lall, who was afterwards presented to the Additional Judge's Court, was the real appellant, and he lays the whole of the present prosecution and the case against him to a person called Gunesh Dutt Singh, who he says is his mortal enemy and a person of considerable wealth. But he has not called any witness and he rests his defence entirely on the weakness of the case for the prosecution. The learned Counsel, who appeared for the appellant here, complained that the Sessions Judge in deciding this case had not sufficiently analysed the evidence or shown its application to the several distinct heads of charge upon which the accused has been convicted. No doubt this is so. In point of form, the Sessions Judge, after considering the evidence at great length, has found Ram Dutt guilty as it were of the whole case, and in that way has convicted him upon all the counts or heads of charge which that case appears to have involved. The most material witnesses in this case undoubtedly are, first, the pleaders who were present in the pleaders' room on the occasion when the first Rung Lall had made his appearance, then the mookhtear Ram Gobind Sahoye, the Inspector of Police Ram Churn Roy, Munoo Lall Putwary and other persons who depose to the fact that there was no Rung Lall in Bihinuggur, and then the witnesses Kalinath and Sreepal Thakoors who speak to the identity of the second Rung Lall with Bhagbut Thakoor. As to the Bengalee gentlemen whom I have spoken of as pleaders, I think there can be no doubt that their statements may in the main be relied upon. The same may be said, I think, of the mookhtear Ram Gobind Sahoye. It must be borne in mind, and this is an observation which applies to most of the witnesses in this case, that this witness was in a somewhat embarrassing position, and that he gave his testimony under a certain sense of restraint. All the pleaders and other professional persons who were witnesses in this case were in a difficulty between saying too much and too little, and Ram Gobind in particular saw himself placed in such position. He was not only implicated in a case which was dangerous, but he was an unlicensed mookhtear who had practised in that capacity in the Civil Court and who might find himself in difficulty on that account. With his reservation Ram Gobind's testimony seems in the main true. Ram Gobind proves that Ram Dutt appellant came to him, told him that he, Ram Dutt, had lost a case of his in the Moonsiff's Court and he required his professional assistance. If we couple his evidence with that of the pleaders and with what is uncontroverted as to the conduct of Ram Dutt with reference to what had happened in the pleaders' room, there can be no doubt to any reasonable mind that Ram Dutt was the real prime mover in the suit, and that it was his suit and no one else's. The evidence of Rajaram and Kanhya Gope must be taken with certain deductions. These persons being of inferior status and education, were not able to refrain from the common fault of witnesses exaggerating and making more of what was the real truth in the case. But I am quite convinced, and so is Mr. Justice McDonell, that the statements of these persons that the bond was not given by Rajaram and the money was not borrowed by him are substantially true, and that the case, so far as it affects them, is absolutely false and unfounded. Something has been said as to the omission to call Hur Prosad who was also a

Digitized by Google

mookhtear of the defendant Rajaram. It is clear that if Hur Prosad had been called his testimony would have been impeached on the ground that he was a partizan, nor could he prove in this case anything which is not made out in other ways. We have then a body of evidence commencing with that of the Inspector of Police from which it is clear that there has not been for some years past in the villages Bihinuggur, Mukrunda, &c., any trace of Rung Lall.

The Inspector has been allowed to make a great number of statements which the Sessions Judge has admitted as evidence, but which he certainly ought not to have admitted as such. This man, under the orders of his superior, no doubt, proceeded to Bihinuggur and several other places, made a great number of enquiries, and collected a great number of facts, which, no doubt, might be of use to him and to the Police, but which were not properly evidence as could be given in Court. The Judge justifies that evidence by the 8th clause of Section 32 of the Evidence Act which is to the effect that a statement becomes a relevant fact when it is made by a number of persons and expresses feelings or impressions on their part relevant to the matter in question. The meaning of that evidently is, that when a number of persons assemble together to give vent to one common statement, which statement expresses the feelings or impressions made in their mind at the time of making it, that statement may be repeated by the witnesses and is evidence. That certainly does not mean that a Police officer may go round, collect a great number of statements from persons in different places, and afterwards put those statements in second hand before the Court as evidence which may affect the result of a criminal trial.

As to the principal evidence elicited as regards Bihinuggur, I think the evidence is admissible. Then there are several witnesses, Kalinath Thakoor and others, who prove expressly that the person alleging himself to be the real Rung Lall and who is not now present was not Rung Lall, but Bhagbut Thakoor, an old servant of Gopeenath Baboo, and on that point, it appears to me that the evidence is as clear and convincing as it is possible to be. Some of the witnesses on this point brought up a book which was alleged to be the household book of Gopeenath Baboo, in which the name of Bhagbut was entered with those of his other servants, and there was a great deal of discussion as to whether the book was authentic or not. In fact, it appears to me that the book is quite superfluous. Bhagbut immediately on his appearance in the Judge's Court was so challenged, and in fact the evidence as regards him was so full and uncontroverted, as leaves the matter quite plain without the assistance of any other evidence. These are the principal witnesses in the case. They appear to me to substantiate the case against the appellant. One may do that which is not done by the Sessions Judge, and show that with certain exceptions the facts really do make out the charges against the prisoner, but those facts must be taken in an inverted way. The first thing, no doubt, is the personation. It is quite manifest that Bhagbut Jha was not Rung Lall but Bhagbut. It is quite manifest that he was produced and set up by Ram Dutt Chowdhry. It is quite clear also, I think that the first Rung Lall, who presented himself in the pleaders' room, was the real Rung Lall, and was the person intended to be described in the plaint and the petition of appeal. That appears from the fact that he, although a resident of Mukrunda, had at various times and for long periods come to and lived in Bihinuggur. In that way he might be described as a resident of Bihinuggur. It is clear also that he did not bring the appeal. He denied it on oath, and I see no reason to doubt that the denial is true.

In these circumstances who was the person who brought the appeal if it was not Ram Dutt who admitted by his conduct in the pleaders' room that he was in fact the prime mover in it, who brought up the false Rung Lall, and who was unable to face the real Rung Lall when he appeared, who also on the evidence of the mookhtear Ram Gobind Suhoye instructed him and also it would seem got the vakalutnamah executed. That being so what possible suggestion is there as to who could have brought the suit. Evidently the person who failed in the suit would be the person who would appeal and who did appeal. Going back, therefore, from the first false personation to the bringing of the appeal, to the forged vakalutnamah, to the filing of the plaint, and to the bond on which the suit is based, we think the guilt of the accused is clearly established. We therefore find that the person produced by Ram Dutt was Bhagbut Jha, and not Rung Lall; that false evidence was given upon that question; that there never was any Rung Lall of Bihinuggur; that no such person brought the suit or the plaint; that Rajaram never executed the bond; that the person who caused the false personation of Bhagbut, abetted the forgery of the vakalutnamah,

Digitized by Google

and brought the appeal was Ram Dutt. These facts make out the 1st, 2nd, 3rd, 4th, 7th, 8th, and also the 9th and 10th charges, which properly ought to have been only one. The 4th and the 5th charges fail as a matter of course, inasmuch as the matter had not gone up to trial in appeal, and the bond and the plaint were not used there so as to make it the foundation for a charge.

As I have already stated, a great deal of *ir*relevant matter was admitted and occupied the attention of the Judge in these proceedings. For instance, the Judge took into consideration the proceedings and decisions in certain other suits against the prosecutor Rajaram Gope. These proceedings ought not to have been taken into consideration, because Ram Dutt was not a party to them, and could not properly be affected by them. In like manner, some parts of the proceedings before the Additional Judge relating to this enquiry were not receivable against Ram Dutt, because he was not present and was not a party. They could not therefore be used against him; but, although as I have said a good deal *of ir*relevant matter found its way into the case, although the Judge has greatly occupied himself in adverting to matters of that description, and has gone out of his way in dealing with those matters, yet I think it fair to say that the Judge's anxiety to get at the truth in this case, and his desire to deal fairly with it are beyond question, and that the prisoner has in no way been prejudiced by the proceedings which took place. The arguments and objections of Counsel have been heard, admitted, and recorded with tedious manner and unnecessary prolixity, and certainly it does appear that the Counsel on one side at any rate, so far from assisting the Judge in this prolonged and difficult trial, rather embarrassed and perplexed him. The gentleman to whom I refer is not an advocate of this Court. If he had been it might have been desirable that we should take further notice of his conduct.

One other matter before stating our final decision in this case it is necessary to advert to. Great stress is laid by Mr. Woodroffe on the opinion of the assessors. Both the assessors considered that the accused was entitled to an absolute release. Now I am bound to say that the assessors in this case were not very judiciously chosen. Regard being had to the nature of the case, to the person who was tried, to the nature of the evidence to be brought against him, and to the public feeling which must have been considerably excited, I think the assessors ought not to have been pleaders. They ought not to have been natives of Bengal. They ought not to have been, as the Judge describes them, young men fresh from College, devoid of experience and rather theoretical than practical men. They ought to have been persons of independent condition in life, men of judgment and of experience. The result has been precisely what might have been expected from the selection. Their opinions no doubt are conscientious; and, if we make some allowance for the situation in which they found their place, not unfair, but they are rather specious than sound. They appear to have been placed in a false position by the Judge, have put questions, raised objections, and done other things which their situation did not require; and, on the whole, we think that their opinion ought not to influence our decision in the case. We agree with the Judge, and find that the prisoner has been properly convicted on the heads we have mentioned, but we also think, notwithstanding all that the Judge has said, and even if we take into consideration some things which he ought not to have considered, that the punishment given in the case is greatly beyond what is necessary. Regard being had to the situation and life of the accused and to the whole circumstances of the case, we think that a sentence of transportation for seven years and fine of Rs. 1,000 will meet the requirements of the case. We reduce the sentence accordingly. The transportation will be under Section 59 of the Code in lieu of imprisonment.

The 20th February 1875.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

(Miscellaneous Case.)

Kali Prosunno Bagchee, *Petitioner.*

Mr. M. M. Ghose and *Baboo Greeja Sunkur Mojoomdar* for Petitioner.

Under s. 471, Criminal Procedure Code, the Court must first make a preliminary enquiry to satisfy itself

Digitized by Google

that a specific charge coming under the sections mentioned in it ought to be preferred against the accused; and after being so satisfied, it must either commit the *case* or send the *case* to the Magistrate for enquiry whether a committal should be made or not.

Phear, J.—We think that the warrant must be quashed. The words of Section 471 of the Criminal Procedure Code are :—"When any Court, Civil or Criminal, is of "opinion that there is sufficient ground for "enquiring into any charge mentioned in "Sections four hundred and sixty seven, "four hundred and sixty eight, and four "hundred and sixty nine, such Court, after "making such preliminary enquiry as may "be necessary, may either commit the case "itself or may send the case for enquiry to "any Magistrate having power to try or "commit for trial the accused person for the "offence charged."

It appears to us plain from these words that the Court must, in the first place, after making such preliminary enquiry as may be necessary, if any be necessary for the purpose of satisfying itself on this point, be satisfied that a specific charge coming under the Sections mentioned ought to be preferred against the accused. And being so satisfied, the Court may then either commit the *case* itself, that is, commit the person for trial on that charge, or send the *case* for enquiry,—that is, send the matter of that charge to the Magistrate for enquiry whether a committal should be made or not.

In the case which is now before us, it appears plain that the Sessions Judge did not satisfy himself that any specific charge ought to be made against the accused, and he did not mention any specific charge in his letter of reference to the Magistrate. He deputed that part of his duty to the Magistrate, *i.e.*, sent the case generally to the Magistrate for enquiry and investigation, in order that the Magistrate in the place of the Judge might satisfy himself whether any charge of any kind should be made against the accused.

This is in our judgment not a performance by the Judge of the condition precedent which this Section, 471, rendered necessary before the Magistrate should have power to enter upon the enquiry. The warrant is therefore quashed, and the accused person's recognizances must be discharged.

The 27th February 1875.

Present :

The Hon'ble F. A. Glover and Ro Chunder Mitter, *Judges.*

Right of Private Distraint—Act X s. 116—Resistance of Distraint—India Code ss. 79, 97, and 99.

Reference to the High Court under 296 of the Code of Criminal Pro by the Sessions Judge of Cuttack.

The Queen

versus

Kanhai Shahu and others.

A zemindar is justified in exercising his private distraint of crops, if he has served the d with written notices under Act X of 1859 s. 1 in such a case, ryots, who knowingly resist the d are not protected by the Penal Code, s. 79. Bu zemindar's people enter upon crops with int distraining without notice, the ryot-owners are in considering such action as trespass.

***Quære.*—Would the ryots in the latter case tected by the provisions of the Penal Code, ss.9 in preventing the distraint and confining employed to make it?**

***Reference.*—The general facts of t have been so fully detailed by the Magistrate in his judgment and in planation submitted by him that the not now be recapitulated.**

I have firstly to state that this re does not apply to the conviction of Shahu prisoner No. 1. His crop ha distrained under the authority of t It may, therefore, be said that he ha rightly punished for joining with ot putting certain persons under wrongf traint. No illegality had been comm far as he was concerned, and he co like the other prisoners consider t property at any rate was being i appropriated. Under such circumstan should have abstained from any inter of any kind.

With reference to the other prisc am, looking to the whole circumsta the case, strongly inclined to believ their sole object was at once to bring notice of the proper authorities at C what the Joint Magistrate admits t been very sharp practice on the part o landlord which they "owing to a m of fact *bonâ fide* believed themselves ju by law in resisting." (*Vide* S. 79 *of* Code.)

Digitized by Google

That sharp practice is correctly described by the Joint Magistrate in the following words :

"The real fact appears to me to be, that having secured the presence of the peon as the representative of the civil power, the zemindar or his subordinates thought that by taking the opportunity of distraining the crops of other defaulters, while the peon was actually on the ground superintending the distraint of Kanhai Shahu's crop, their private distraints would have an appearance of authority which would probably prevent any resistance on the part of the ryots."

It is in evidence that when the reapers who accompanied the peon began to cut crops other than those of Kanhai Shahu, the villagers naturally enough inquired on what authority this was being done, and objected to such a proceeding, when they found that the peon had only been deputed to cut Kanhai's crop. Neither the peon nor the zemindar's people attempted to explain that, as notices of demand had been served on Fakir Sahu and others, their crop also could be cut in the exercise of the right of private distraint. Neither was it alleged that crops could be cut without notice. The gomashta of the landlord, one Gokul Mahanty, used taunting words (*vide* evidence of Chowkidar Raghu Swain in Joint Magistrate's notes) "All will be cut. What are one or two?" The peon, although, as the Joint Magistrate says, there is little doubt that he heard objections made by Fakir Sahu to what seemed an attempt to cut the crops wholesale, made no effort to ascertain whether the landlord had issued notices about the crops which were not alluded to in his the peon's perwannah, nor did he explain clearly that he had nothing to do with those crops. I am decidedly of opinion that the behaviour of the gomashta and the peon was of a nature likely to induce ignorant peasants to believe that the landlord, with the assistance of the peon, was about to attempt a wholesale cutting of crops (though unauthorized by the Collector) with a view to striking terror into their minds and getting the better of them in the dispute about enhanced rents which was admittedly going on.

Not only is there reason to believe that the villagers were induced to think that the landlord was acting illegally and oppressively, but they acted exactly as persons who had formed such an opinion would act. They did not try to drive away the distraining party or the peon or to rescue the crop, but simply insisted on the reapers finishing their work and going into Cuttack with the cut grain. On arriving at a certain bridge, the reapers refused to go on. No violence was then used, but the landlord's party and the peon were detained, and the Police were duly informed of the fact by two of the villagers. It is true that the Police were not told that a collectorate peon was in custody, but as they insisted on keeping him at the bridge, it is obvious that there was no attempt to conceal his arrest.

If the above view of the facts disclosed by the record is correct, it follows that the acts of the villagers fall under Section 79 of the Penal Code, even if it be assumed as is done by the Joint Magistrate, that the villagers had no right to resist the cutting of crops other than those of Kanhai, although not included in the peon's perwannah and although no notices of demand had been issued under Act X of 1859. The conduct of the zemindar's people and the peon was, I think, such as was likely to cause a mistake of fact on the part of the tenants ; that is, to make them believe that the landlord was not exercising a right of private distraint, but ingeniously abusing the aid granted to him by the Collector against Kanhai alone in order to cut the village crops wholesale in an oppressive and high-handed manner. If there was (as I maintain from the evidence on record) such a mistake of fact, the conduct of the villagers of Serangar, in restraining without unnecessary violence both the distraining party and the collectorate peon and trying to bring them into Cuttack along with the crops cut, may, in my opinion, well be held to fall under Section 79 of the Penal Code. Uriya peasants are very often ignorant of law, and it is not a matter of surprise that they should have taken a somewhat primitive but very effective method of at once bringing to the notice of the authorities close by, ostensively aggressive proceedings on the part of their landlord, the possible technical legality of which had been neither alleged nor explained.

On the above grounds I think that the conviction should be quashed ; but should the High Court be of a contrary opinion as to the applicability of Section 79 of the Penal Code, I have further to submit that there should be a further inquiry as to whether notices of demand had been duly served in accordance with the provisions of Act X of 1859 on Fakir Sahu, the cutting of whose crops in addition to those of Kanhai, first gave rise to the disturbance, if such a name can be given to the, on the whole, remarkably

Digitized by Google

temperate demonstration of the Serangar villagers.

The necessity of such an inquiry seems obvious. The Joint Magistrate was of opinion that, whether notices were served or not, the villagers were guilty. There has therefore been no finding as to the value of the evidence (such as it is) which has been tendered to prove service. The prosecution have not had a fair opportunity of offering further evidence, and the prisoners have not been allowed to disprove what has been said. If the conviction is upheld as it stands, it must be on the assumption that, if the landlord chooses to cut the crop of his tenants wholesale without notice of demand, tenants can do nothing in self-defence and must content themselves with a subsequent and possibly very precarious civil remedy.

To my mind such an interpretation of the law is erroneous. The Joint Magistrate quotes Section 143 of Act X of 1859 and deduces therefrom that a tenant cannot exercise the right of self-defence in any case of distraint. But Section 143 does not say that a tenant cannot resist an outsider should he attempt to cut his crop, but only lays down that the said outsider can be prosecuted for criminal trespass as well as for damages. It cannot surely be contended that if a perfect stranger comes and cuts his crops under color of the distraint law, the tenant is to have no right to immediate resistance, but must calmly look on or go for the Police. I am of opinion that neither Section 143 or any other Section of Act X of 1859 in any way clashes with the general principle of self-defence by which each citizen of the state is justified in resisting every illegal act committed against either his person or his property.

It should also be borne in mind that the cutting of a tenant's crop without previous notice of demand is not only a technically illegal act but practically amounts to a great wrong. The standing crop is often all that the tenant possesses in the world of any real value, and if it can be carried away to the landlord's granary without his having any chance of paying or depositing the rent claimed, the result will be that every tenant who has no stock or capital independent of his crop will often find himself entirely at the mercy of his landlord. It can surely not be intended that every tenant must submit without resistance to an arbitrary act which may have the effect of putting him at the very outset in a most disadvantageous position whenever he and h on friendly terms.

For the above reasons that, unless the High Court in the same way as the J further enquiry should be service of notice.

I have in conclusion to of the prisoners have be short terms of imprisonmen them to be released on however be said that I hav I think that, if this refe to be quickly disposed of, i able for the High Court to the order of release pending of the case.

Judgment of the H

Glover, J.—Before dispo ence, we must know whet acted according to the provi He would have been justi his right of private distrain other than those of Kanha previously served the defau notices under Section 116 and, if such notices were who knowingly prevented confined the men employed no excuse for their conduct Penal Code, quoted in the Sessions Judge, would be in

If notices or demands un of Act X of 1859 were the ryot-owners of crops zemindar's people were ent tion of distraining withou have been justified in consi of those people as a tres possibly have been protected of Sections 97 and 99, Pena what they did; but I exp opinion upon this point as ye

But they would not in an justified in seizing and confi torate peadah who had been the crops of Kanhai Shahu, a appear to have done anythi have outstepped the limits of way. He told the ryots dis had come for and showed wannah. The conduct of th him was altogether unjustifia

With reference to the la letter of reference, it appea there was no power in the the release of the two accused Joint Magistrate was clearly

Digitized by Google

part of the case, nor does the Judge seem to contest the point. It would be hard now perhaps to remit these two persons to jail whilst the further enquiry ordered by this Court is pending, and the result of which would no doubt influence me in any award of punishment, and, under the provisions of Section 297, Code of Criminal Procedure, I would allow these men to be at large on bail; but this must be considered as a distinct order of this Court made with jurisdiction, and not as a confirmation of the Sessions Judge's order, which was one made without jurisdiction; and I think it due to the Joint Magistrate, who has acted throughout these proceedings in a very proper way, to declare that his objections to the Sessions Judge's order releasing the accused on bail, were not without foundation.

Mitter, J.—I concur.

The 2nd March 1875.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges*.

Contractor—Public Works Department—Cheating—Act XLV of 1860 *s.* 420.

The Queen

versus

Kalipuddo Poramanick, Appellant.

Committed by the Magistrate and tried by the Sessions Judge of Midnapore on a charge of cheating.

Mr. R. T. Allan and *Baboo Radhika Churn Mitter* for Appellant.

A contractor in the Public Works Department who was charged with cheating in respect of a sum of money which he received on account for work which it was alleged he had not then finished, was acquitted on the evidence, because it was not proved (1) that there was a false pretence made use of by accused; (2) that he knew he was making use of a false pretence or that he intended to defraud; (3) that the Public Works Department were deceived by the pretence on account of their belief in its truth; and (4) that the accused received the money with the intention of causing wrongful loss to the Government.

Kemp, J.—The accused has been convicted under Section 420 of the Indian Penal Code of the offence of cheating, and has been sentenced to one year's rigorous imprisonment. The assessors were for acquitting the prisoner, but the Judge differed from their opinion, and convicted him. The accused is a contractor and so far as we can judge from the record, it appears that he has had extensive dealings as a contractor with the Public Works Department, and from the contracts which are on the record it seems that he has hitherto borne a good character as a contractor. The contract with which we have to deal in this case is on the record, and it appears that the accused contracted to raise the right embankment of the Cossye Nuddee from Ryepore to Bejapore or from the 23rd milestone to the 30th milestone. The distance is said to be 8 miles. He was to receive for earthworks done by him at the rate of 2 Rs. per 1000 cubic feet, for dressing at the rate of 4 annas per 1000 cubic feet, and for turfing at the rate of 12 annas per 1000 cubic feet. Now it is important in this case to consider the conditions of this contract. They are, that the work is to be subject to the approval of the Executive Engineer for the time being or his subdivisional officer, whose decision as to the rate of progress and the quality of work or material shall be final. Then the 2nd condition is a very important one, and runs thus. The quantity of work executed shall be measured and payments made after certain intervals, for in the contract is to be found the word "every," and the number of days is left blank, and an inquiry is to be made into the quantity of work done at intervals. And it is further stipulated that on the completion of the work or determination of the agreement, a final measurement will be made and the account shall be adjusted accordingly, and that the measurement will be made by borings on the embankment, and 1-7th deducted for settlements. It is alleged by the prosecution that the accused received on the 21st of December 1873 Rs. 430-4-3, and that in receiving this sum he has committed the offence of cheating.

On referring to Exhibit A upon which the charge in the present case is founded, we find that it is certified that 26,99,365 cubic feet of earthwork were completed and charged for, that quantity of work amounting to Rs. 5,398-11-6 at the rate of 2 Rs. per 1,000 cubic feet. Then there is a deduction for work done by another contractor, Haran Chunder Mozoomdar, 7,45,752 cubic feet amounting to Rs. 1,491-7-3 at the same rate of Rs. 2 per 1,000 cubic feet, and the balance after that deduction would be Rs. 3,907-4-3. On the back of Exhibit A we find a certificate by the Sub-Divisional Officer Kali Dass Dass, Sub-Overseer, to the effect that the foregoing claim, that is to say, the claim set out on the other side of the certificate, is correct, that

Digitized by Google

the work has been satisfactorily performed, and that the measurements have been made by him, and are recorded in note book No. 4. Then there is another endorsement by Baboo Mohesh Chunder Bose, Assistant Engineer, who has been examined as a witness in this case, to the effect that 25 per cent will be kept in hand pending check. Then follows the receipt of the accused Kali Puddo Poramanick for Rs. 430-4-3, and then comes a memo., and this memo is according to the rules of the Public Works Department to be filled up when the payment is a payment on *account only*. Now this memo. shows that the total value of the work done up to date was Rs. 3,907-4-3 ; that there were previous payments on account amounting to Rs. 2,500 ; and that the payment now made on account was Rs. 430-4-3, leaving a balance due to the contractor of Rs. 977. Now it is said by the prosecution that in the first instance the work of the accused was checked by Baboo Mohesh Chunder Bose, who found that, instead of 26,99,365 cubic feet having been supplied, only 11 lacs and odd cubic feet had been supplied. The contractor appealed against this measurement of Baboo Mohesh Chunder Bose to his immediate superior Mr. Kimber. Mr. Kimber, after allowing a very long period to elapse, or nearly a year after the completion of the work, checked the measurements made by Mohesh Chunder Bose, and found that only 10,82,871 cubic feet had been completed. It is upon this check measurement of Mr. Kimber that the present prosecution is based.

We are informed, and this information is supported by an attested copy of a plaint filed by the accused in the Civil Court, that the accused has brought a suit against the Public Works Department for the recovery of a large sum of money, or nearly Rs. 9,000, and we also find that this prosecution was not instituted until the 11th of September 1874 or three days only before the presentation of the plaint in the civil suit ; the deficiency in the work as turned out by the accused having been discovered, as alleged, in May 1874. We also find that intermediately between the discovery of this alleged deficiency and the institution of the present prosecution there had been a correspondence between the attorney of the accused and Mr. Kimber, who has been examined in this case. The attorney, Baboo Poorno Chunder Mookerjee, an attorney of this Court, addressed Mr. Kimber to the effect that he had been instructed by his client to demand from him the sum of Rs. 9,684, 15 annas 9 pie, and that if this sum was n client was advised to institute ceedings. In reply Mr. Kimber the attorney of the accused on July 1874, intimating that he w pay Rs. 237-11-7 to the accused reference to the other items set fo attorney's letter, namely, items inclusive, he was ready to accused's fair claims against the on being presented with the ma dence required. So that we ha that overtures were going on be attorney of the accused for what ders his just claims, and Mr. Ki has been examined in this ca resulted in a correspondence in Kimber admits that there was a s the accused, and also that he w settle his fair claims with referenc items which amounted to a co sum. Speaking for myself, I do n any way to question the evidence Mr. Kimber in this case, but ce result of his measurements is very and the deficiency very great ; and consider the fact that an officer Department, Baboo Kali Dass tested the work of the accused in after its completion and found it t rect, and that the sum in respect Kali Puddo Poramanick has been cheating the Public Works Depar advanced on the certificate of Kali one of the officers of the Departm tersigned by the Assistant Engine Mohesh Chunder Bose, it seems this deficiency is most startling. the fact that Mr. Kimber's measure not made until long after the com the work ; and on examining the n Mr. Kimber which has been place record, I find that he has not tested of the accused according to the laid down in the contract. The distinctly says that the work is to by borings in the embankment, Kimber says that he tested the sections, and he also admits in his that "he cannot of his own know what work was done by the acc also find on referring to his note he says that several sections co measured, inasmuch as they wer hands of a new contractor who finished the work.

Now under Section 420, it a me, that there are several ingredie must be clearly and satisfactorily

Digitized by Google

before this Court can convict a prisoner of the offence of cheating. In the first place I think there must be a false pretence made use of by the accused. Then I think that the person making use of such false pretence must know that that pretence is false; 3rdly there must be an intention to defraud; 4thly the owners of the property, in this case the Public Works Department, must have been deceived by the pretence *in* consequence of their belief in its truth; and lastly, that the property so obtained is such as is contemplated by the Code. Now in this case the property obtained is a sum of money from the Public Works Department. There is no evidence that at the time the accused received this small sum of Rs. 430 on account he knew that he was making use of a false pretence, namely, that he was stating that the work had been completed as in the certificate Exhibit A, knowing such statement to be false. There is also in my opinion no evidence of his intention to defraud the Public Works Department, nor do I think that there is sufficient evidence to show that the officers of the Public Works Department were deceived by the conduct of the accused and that they parted with this money, namely, Rs. 430-4-3, in consequence of their belief in the truth of the statement made by the accused. Then I do not think that the element of dishonestly obtaining this money has been made out against the accused, that is to say, that he received this money, to use the words of the Code, "with intention to cause wrongful loss" to the Government. It appears clear that there have been many transactions between the accused and the Public Works Department with reference to contracts undertaken by the accused; that there has been a running account going on; that the accused has from time to time received sums on account, and we have the fact which cannot be lost sight of, that he is now prosecuting his claim *against* the Public Works Department for a very large sum of money. I say nothing as to whether his claim is a just one or not, but we have the fact staring us in the face that he is prosecuting a heavy claim against the Public Works Department and that this charge was brought only three days before the institution of the civil suit by the accused and long after the test measurements made by Mr. Kimber, for, as already stated, nearly a year had elapsed between the completion of the contract and the time when the work was tested. We have also mention made by Mr. Kimber in his evidence of a heavy flood having occurred during that interval.

On the whole case I am not satisfied with the evidence adduced by the prosecution in this case, and I think the prisoner is entitled to an acquittal. I therefore direct his immediate release. The conviction and sentence are set aside.

Birch, J.—I have gone carefully through the evidence in this case, but as I find that a civil suit is at this time pending between the prisoner and Government regarding this and other accounts, I refrain from making any observations upon the evidence in this case, which I otherwise might consider it necessary to do. I think it sufficient to say that upon a careful consideration of the evidence adduced, I am of opinion that it does not establish the offence of cheating, and I concur with my learned colleague in holding that the prisoner should be immediately released.

The 4th March 1875.

Present:

The Hon'ble L. S. Jackson and W. F. McDonell, *Judges.*

Breach of the Peace—Possession—Land Dispute—Jurisdiction—Document—Agreement—Act X of 1872 s. 530.

(Miscellaneous Case No. 185 of 1874.)

Bejoy Nath Chatterjee, *Petitioner,*

versus

The Bengal Coal Company Limited, *Opposite Party.*

Messrs. J. H. A. Branson and *C. Jackson* and *Baboo Bama Churn Mookerjee* for Petitioner.

Mr. J. T. Woodroffe for Opposite Party.

The possession in regard to which the Magistrate's jurisdiction under s. 530 of the Code of Criminal Procedure should be exercised must be of a real and tangible character.

When a party claims under a document or agreement the right of doing certain things over a large extent of territory, the performance of acts under such alleged right in one portion of the ground over which the right extends, although it may be good and sufficient for the purpose of keeping alive that right so as to be an answer to the plea of limitation raised in a civil suit, is not of itself a sufficient possession on which the Magistrate's order under s. 530 may be based for the purpose of forbidding in a distant locality acts not necessarily in conflict with such possession though at variance with the right.

Jackson, J.—We have given this case very careful consideration, because while on one

Digitized by Google

hand we are anxious not to unduly tie the hands of the Magistrates who are responsible for maintaining the peace, on the other hand this Court has always so construed the provisions of Section 530 and the corresponding provisions of earlier enactments on the same subject as to take care that the Magistrates do not volunteer decisions on questions properly cognizable by other Courts and unnecessarily complicate investigations which afterwards take place in those Courts. The present case relates to a dispute regarding the right to dig for coal on some land comprised within the limits of Mouzah Nimcha, which belongs to the proprietors under whom both the contending parties claim. The complainants before the Magistrate were the officers of the Bengal Coal Company, and they alleged themselves to have been in absolute possession. I use the words of the manager of the Company himself, because they appear to have been spoken with great emphasis and upon oath :—"We are in possession of the whole of the "land in the village as surveyed by the "Company's surveyor." Mr. Pell, who is also the manager of the Company, makes also these statements :—"The Company is "in possession, as respects under-ground "rights of the whole of the village of "Nimcha : not only of 800 beegahs. I look "upon Mr. De la Courneuve's proceeding of "September 1872 as not being an investiture "or acquisition of possession, but as an act "done in pursuance of previous and acknowledged possession." In cross-examination he says :—"We are in possession of the whole "of the land in the village as surveyed by "the Company's surveyor." Again he says in answer to the question "you thought you "were in possession of the whole village ?" "I know we are. I did not think about it." The pottah under which the Bengal Coal Company advances this claim is with the papers of the case, and it becomes necessary to advert to it, because the Joint Magistrate, although by the terms of Section 530 he is directed to proceed without reference to the merits of the claims of any party to a right of possession, to enquire and decide which party is in possession of the subject of dispute, says:—"On the fair presumption that possession lies where it ought to lie, two leases "have been put in and considered," and the Magistrate thereafter enters pretty fully into a consideration of the terms of the Company's lease with which he considers the possession of the Company to be in entire accordance. He says :—"One of these, granted to the "Bengal Coal Company about 18 years ago, "confers (according to my summary interpretation) upon them the mineral rights "underneath the whole of the estate, whatever might be its area. That area is "(incidentally as I think) mentioned as "being 800 beegahs, but the essential parts "of the grant seem to me to be the words "তাবৎ and বাকি (all that we have is given "to you), the words তাহাতে যে জমি ভুক্ত হইবেক "ঐ ভুক্ত জমিতে কয়লা খাদ করিতে কি করাইতে "পারিব না, and the omission of any such "expression as we give you 800 beegahs "out of our estate." Then he refers to the absence of certain other words which seem to him to be significant. Now the sight that we had into the pottah during the argument led me to be doubtful as to the Magistrate's interpretation of it. I have therefore read it very carefully this morning, and it seems to me that the Magistrate is entirely in error as to the true meaning of the pottah. It is in these words:—"আমাদের বাজেআপ্তি লাখেরাজ সেরগড় পঃ মৌজে "নিমচা যাহা আমাদের দখলে আছে তন্মধ্যে কলাক্টর "৬৬ বিঘা শিডর ইষ্টমিট সাহেবকে বন্দোবস্ত আছে "তাহার কি অন্য কাহার আর কোন জমি দখল "আমল নাই।" It starts with the recital that out of the resumed lakheraj village of Nimcha, which is in the possession of the owners, 66 beegahs have been settled with Mr. Dorrschmidt, and with that exception neither he nor any other person has got any concern with the land. "সে মতে ঐ ৬৬ বিঘা জমি ভিন্ন গ্রাম "মজকুরের তাবৎ কয়লার ভূমি আমাদের দখলে আছে ও "তাহা আপনকার সহিত বন্দোবস্তের কথা হইতেছিল।" Accordingly he says, with the exception of the 66 beegahs, the whole of the coal land within the village is in our hands, and there was negociation going on in regard to the settlement of that with you. "এক্ষণে গ্রাম "মজকুরের চতুঃসীমার কয়লার ভূমি উপরোক্ত ৬৬ "বিঘা বাদে বাকি ৮০ হাতের রশীর মাপে আন্দাজি "৮০০ বিঘা পতিত ডাঙ্গা মায় নিজকৃত খাদ কি "বিঘা ।০ আনা দরে সালিয়ানা কোম্পানি ৪০০ "শত টাকা জমায় ৪০০ টাকা পণের পরিমাণে "আপনাকে মকররি বন্দোবস্ত করাগেল," that is, reserving the aforesaid 66 beegahs of land

Digitized by Google

out of the coal land of the said village, the remaining estimated area of about 800 beegahs of *puteet danga* (that is waste elevated land) of the village, inclusive of pits excavated by myself, is let to you in mokurrureе at the rate of 8 annas a beegah; for the sum of Rs. 400, with পণ or consideration at a like amount. "ইহার পর জরিপ "করিয়া কমিবেশি হইলে ঐ হারে জমা পণ কমি- "বেশি হইয়া যে জমা ধার্য্য হইবেক সন ২ মাস ২ "মাফিক কিস্তিবন্দি সরবরাহ করিবেন।" Afterwards, on measurement, if the land should turn out to be more or less, thereupon there will be adjustment of the rent, and you will pay the rent which will be fixed, by regular instalments. There is then a provision for the payment of interest if the rent be not paid on due dates. It is then stipulated "মালগুজারির বিষয় কয়লা খাদ করা না করা ইত্যাদি "কোন ওজর করিতে পারিবেন না ও করিলেও গ্রাহ্য "হইবেক না," that is, you shall not be at liberty to make any objection as to the payment of rent on the ground of your having dug or not dug coals. "জমি মজরা কয়লা "খুদিয়া ও এমারত আদি করিয়া যদৃচ্ছারূপে নীচস্থ "উপরস্থ হকুক পুত্র পৌত্রাদিক্রমে ভোগ দখল "করিবেন।" You are to enjoy from generation to generation the under-ground and over-ground rights of the land in question by the digging of coals and by the erection of buildings according to your wishes. "উপরোক্ত হারের "উপর কখনও কমিবেশি হইবেক না।" There is to be no alteration in the rate of rent above mentioned. "আর প্রকাশ থাকিল যে গ্রাম "মজকুরের সালিজমি ও সুনা ও উদ্বাস্ত ও বাগিচা ও "পুষ্করিণী ও খুজরা বৃক্ষের সহিত আপনকার কোন "এলাকা নাই ও থাকিবেক না।" You are not to have any concern with the rice growing land, *viz.*, *salee*, *soona* and *oodbastoo* or with lands reserved for buildings, gardens or tanks, or with the trees growing on the estate. "ও বন্দোবস্তি ডাঙ্গা পতিত জমির উপর "গো মহিষ আদি যে মত চরিতেছে সেই মতই চরিবেক." Cows and buffaloes are to be allowed to graze over the waste and elevated lands under settlement in the same manner as heretobefore. "রাস্তার বৃক্ষাদি যে মত আছে সেই মতই থাকিবেক "তাহাতে কোন আপত্তি করিবেন না ও করিতে পরিবেন "না।" The trees over the roads are to continue as they are without any objection being raised. "ইহাও প্রকাশ থাকিল যে এই বন্দোবস্তি ডাঙ্গা "পতিত জমির মধ্যে বাগিচা কি পুষ্করিণী দিবার "আবশ্যক হইলে আমরা দিব ও দেওয়াইব তাহাতেও "আপনকার কোন ওজর আপত্তি থাকিবেক না, ফলতঃ "তাহাতে যে জমি ভুক্ত হইবেক ঐ ভুক্ত জমিতে কয়লা "খাদ করিতে কি করাইতে পারিব না, কয়লা আপনকার "থাকিবেক আর আপনি কয়লার কারবার করিলে গাড়ি "চলাচলের রাস্তা সুবিধামতে যেখানে আবশ্যক হইবেক "তাহাতে আপত্তি করিব না, ফলতঃ তাহাতে আবাদি "জমি গেলে তাহার পৃথক মালগুজারি করিবেন।"

This is a very important provision, and it has been very seriously misconceived by the Magistrate. It is this, that should necessity arise for making gardens or tanks within the *danga puteet* land settled with the Coal Company, the proprietors shall be at liberty to make or cause to be made such gardens or tanks, and that there shall be no objection made; but it is provided that on the lands so taken, *viz.*, for the purpose of making gardens or tanks, the landlord shall not be at liberty to dig for coals, but that the coals shall remain the Company's property. Then it goes on,—if the Company, for the purpose of carrying on the trade, find it necessary to make roads for carts, they may do so, and there will be no objection; but if it be necessary for that purpose to take cultivated land, they shall pay for such land. Nothing can be clearer upon the terms of that document than that all that the Coal Company took under the grant was the right to dig for coals under such portion of the estate as might be found fit for the purpose, and which for the moment was estimated at 800 beegahs, and to erect such buildings and make such roads as they thought necessary for that purpose. The above grant is most distinctly limited to purposes ancillary to the working of coal underground. Now, it is admitted, and it appears from the map put in by the Coal Company themselves, that the working of coal under this ground is at present limited to some seven acres. The manager says that he had no idea that the area of the village exceeded 800 beegahs, and that he supposed that the 907 acres, of which the area really consists, must have been beegahs. It is exceedingly difficult to believe that a gentleman, who is fit to hold the

Digitized by Google

office of manager of the Bengal Coal Company, could have been under so serious a mistake. I have referred at length to the contents of the pottah, because the Magistrate's decision, although ostensibly based on oral evidence, goes no doubt upon the rights of the parties as he believed them to be under the pottah. The jurisdiction of a Magistrate under Section 530 is defined in these words, that if he is satisfied that a dispute likely to induce a breach of the peace exists concerning any land or the boundaries of any land or concerning any houses, water, fisheries, crops or other produce of land within the limits of his jurisdiction, he is directed, without reference to the merits of the claims of any party to a right of possession, to proceed to enquire and decide which party is in possession of the subject of dispute. Therefore the matter in dispute here, being the right of the opposite party, the lessee under the second pottah, to sink coal pits upon a part of the village of Nimcha, which, as far as we can see from the papers, is not situated within the limits of the 800 beegahs of *danga puteet jumee* on which the Bengal Coal Company are working, all that the Magistrate had to see was whether the complainants or the opposite party were in possession of the subject of dispute. It appears to us that the possession in regard to which the Magistrate's jurisdiction under Section 530 should be exercised must be of a real and tangible character. We think that when a party claims under a document or agreement the right of doing certain things over a large extent of territory, the performance of acts under such alleged right in one portion of the ground over which the right extends, although it may be good and sufficient for the purpose of keeping alive that right so as to be an answer to the plea of limitation raised in a civil suit, is not of itself a sufficient possession on which the Magistrate's order under Section 530 may be based for the purpose of forbidding in a distant locality acts not necessarily in conflict with such possession though at variance with the right. The Magistrate observes that the Coal Company could not be expected for the purpose of maintaining their rights to dig pits over every few acres when they are not presently wanted for mining purposes. Certainly they could not, because if they did so and extended the range of their work, they would make themselves liable for the payment of additional rent under the stipulations of the pottah. It seems to us that there was no ground for the contention that the Bengal Coal C was in actual possession of that po the village of Nimcha whether as to ground rights or otherwise in which complained of took place, so as to en Magistrate to interfere under the pr of Section 530. It appears to me pottah in this case is one upon wh Magistrate should not have put what "summary interpretation." If he take the terms of that document int deration, he ought to have been most as to the conclusion that he had to ar As I have shown, it seems to me tha very seriously mistaken in his cons of the deed, and it is probable that, if taken the right view of the deed, h have taken a different view of the e also. The Magistrate for instance "800 beegahs is only assumed, I *thi* "the time to be the area of that w "really given, *viz.*, the whole : for w "nothing to do with the possession "surface rights." Now it was not s 800 beegahs was the estimated co according to which estimate the lesse to pay, but if measurement showed a of land in their possession there was enhancement. The whole village given to them, but the landlord se right to dig for coal with them, subje sorts of rights which are stated in th

I have carefully abstained from any sort of opinion as to whether th of the pottah are such as restrain lord from assigning over the right to to anybody else. This, I think, is a ly clear that if the landlord, in givi right to the second party under th lately granted, has derogated from th of the Bengal Coal Company, thei is perfectly clear and open, for they liberty to bring a suit against the and the party deriving title from may, on showing sufficient grounds, injunction from the Court restrai latter from taking coal. The Mag I think was not the proper forum they ought to have gone. I think, th that the Magistrate's order was ma out jurisdiction and on a misconce the facts, and that consequently it be quashed. This rule, therefore, absolute with costs, rupees one hundr

Digitized by Google

The 19th March 1875.

Present:

The Hon'ble F. B. Kemp and G. G. Morris, *Judges.*

Whipping—Act VI of 1864 *s.* 7—*Sessions Judge — Procedure — Alteration of Sentence once signed—Act X of* 1872 *s.* 464.

Reference to the High Court under Section 296 *of the Code of Criminal Procedure by the Sessions Judge of Moorshedabad.*

The Queen

versus

Poran Mal.

Under Act VI of 1864 s. 7, a sentence of whipping cannot be superadded to one of imprisonment where the imprisonment is for more than five years. A Sessions Judge has no power, under s. 464, Code of Criminal Procedure, to alter or set aside a conviction and sentence once made and signed by him.

Reference.—In the case of The Queen *v.* Poran Mal and fifteen others tried for dacoity on the 22nd, 23rd, and 24th ultimo, Poran Mal was convicted by the jury of the offence charged; and further pleaded guilty to a previous conviction for dacoity in 1863, upon which occasion he was sentenced to ten years' rigorous imprisonment, which sentence he underwent.

Under these circumstances I sentenced him to ten years' rigorous imprisonment and a whipping of thirty stripes, overlooking the provisions of Section 7 of the Whipping Act (VI of 1864) which do not allow a sentence of whipping in the case of a prisoner sentenced at the same time to imprisonment for more than five years.

The mistake was discovered before the warrant issued.

As I do not believe that I have power to alter the sentence once passed and signed, advertence being had to Section 464 of the Code of Criminal Procedure, I have the honor to request that the High Court will set aside the illegal sentence inadvertently passed by me, and pass instead thereof such sentence as may appear proper. The sentence which I would suggest is transportation for life, or for fourteen years, if such latter sentence can be passed.

On this point I have some doubt which I would gladly have removed. The prisoner is here liable to transportation for life under either Section 395 or Section 75 of the Penal Code, but neither Section says that he can be punished with transportation *for a term* of *years which may extend to the term of his natural life*, thus making transportation for life the maximum of a scale. Having regard to these words, it appears to me that a sentence of transportation for fourteen years would not be legal.

But under Section 75 he is liable to *double the amount of punishment*—therefore he may be rigorously imprisoned for a term which may extend to twenty years (Section 395 read with Section 75)—therefore he may be sentenced to rigorous imprisonment for fourteen years, and under Section 59 transportation for fourteen years may be awarded instead of fourteen years' rigorous imprisonment. I shall be glad to know if this view is correct.

The record is sent herewith.

Judgment of the High Court.

Kemp, J.—This prisoner has been sentenced by the Sessions Judge of Moorshedabad to ten years' rigorous imprisonment and a whipping of thirty stripes under Act VI of 1864.

Before the warrant was issued, the Sessions Judge discovered that the said Act did not admit of a sentence of whipping being passed in a case of a prisoner sentenced at the same time to imprisonment for more than five years.

The Sessions Judge rightly holding that under the provisions of Section 464 of the Code of Criminal Procedure, he could not alter or review his order after it had been signed, has submitted the record to this Court to set aside the illegal sentence inadvertently passed by him, and to pass instead thereof such sentence as may appear proper.

The trial was by jury; the prisoner Poran Mal pleaded guilty to a previous conviction for the same offence of which he has been now tried, and the jury were unanimous in their verdict of guilty under Section 395, dacoity. The prisoner confessed.

We set aside the sentence passed by the Sessions Judge, and sentence the prisoner, Poran Mal, to be transported for life under Sections 395 and 75 of the Indian Penal Code.

Digitized by Google

The 19th March 1875.

Present :

The Hon'ble F. B. Kemp and G. G. Morris, *Judges.*

High Court—Acquittal—Appeal—Act X of 1872 s. 272.

(Miscellaneous Case No. 45 of 1875.)

The Government of Bengal, *Petitioner,*

versus

Haneef Fakeer, *Opposite Party.*

Mr. T. D. Ingram for the Petitioner.

Mr. M. M. Ghose for the Opposite Party.

In a case tried by assessors, in which the accused was charged with culpable homicide not amounting to murder, he was acquitted by the Sessions Judge and one of the assessors, while the other assessor was for a conviction.

The Government of Bengal having appealed under s. 272, Code of Criminal Procedure, the High Court, on a consideration of the evidence, set aside the order of acquittal, and convicted the accused of the offence charged.

Kemp, J.—HANEEF FAKEER was charged under Section 302 and Section 304 of the Indian Penal Code. The case was tried with the assistance of assessors. One of the assessors was of opinion that the prisoner was not guilty under either head of the charge, and that there was no sufficient proof against him. The other assessor was of opinion that the prisoner was guilty under the latter portion of Section 304 of the Penal Code. The Sessions Judge of Mymensingh, concurring with the first assessor, found that Haneef Fakeer was not guilty of the offence specified in the charge, and he directed that the said Haneef Fakeer be discharged.

Under Section 272 of the Code of Criminal Procedure, the Local Government has directed an appeal in this case, and the learned Counsel, Mr. Ingram, has appeared, having been specially appointed in that behalf. This Court, in cases of the description, namely, appeals under the Section just quoted, may direct "an inquiry by another Court, or may pass such judgment, sentence or order as may be warranted by law." I need hardly say that this being, at least so far as my experience goes, the first case which has been brought before the Court under this Section, I have given it my earnest consideration, and I have come to the conclusion, after hearing the learned Counsel on both sides, that the finding of the Sessions Judge discharging the prisoner cannot be supported.

I will endeavour to state the facts of this case as briefly as possible. The deceased Meheroollah was a young man about 20 years of age. It appears from his father's first statement made at the Police-station that the deceased went to fish late at night at a bheel or julkur of the name of Ruttunpore. The father further stated before the Police that he tried to persuade his son not to go, but that his son went. It is in evidence that there were others fishing at the same time with the deceased, and amongst them Sheikh Nazim and Amir Sheikh, both of whom have been examined in this case. Meheroollah left his house with two fishing implements in his hand, and he carried a chattah without a handle, such as is worn by people of his class in the mofussil, fastened on to his head. The witness Nazim, who is a young man, states that about midnight he was bitten by a fish on the finger, and that he expressed his determination to go home at once. Meheroollah volunteered to accompany him. Their houses, I may here state, are not very far apart. The bheel in question is situated to the south of the prisoner's house as well as of the house of Nazim and of the house of the deceased. Proceeding from the bheel towards the house of the deceased, the road runs directly north until it branches off on the east leading to the "baree" or homestead of Nazim, and on the west leading to the house of the deceased Meheroollah. When the two men arrived at that point, it was natural, assuming that their intention was to go to their respective homes, that they should part company, and it appears from the evidence that they did so. The witness Nazim goes on to say that shortly after he parted company with Meheroollah, and after he had reached his house and washed his face, he heard a noise of some one screaming out "I know nothing, and giving dahoy." This part of the case, looking to the description of this noise given before the Sessions Court and before the Magistrate, I do not lay much stress upon. Meheroollah, after parting with the witness Nazim, was never seen again alive, and his body was found early the next morning in the jute field of Narya, which is situated to the south of the house of Meheroollah, and to the south-west of the house of the prisoner. Unfortunately, whether owing to the neglect of the Police or some other cause, the body did not arrive at

Digitized by Google

the Sudder Station in sufficient time to admit of a proper *post-mortem* examination being made. It is also unfortunate, although the native doctor Fujul Ruman attached to the jail in his evidence states that he does not remember whether the Civil Surgeon was in the station on the day the corpse arrived, that no examination of it was made by the Civil Surgeon. The examination by the native doctor was, as the learned Counsel Mr. Ingram observes, a very perfunctory one. The doctor says that the body was too decomposed to admit of a *post-mortem* examination; that there were maggots in the body; and that the cuticle had peeled off, and consequently he was unable to say what was the cause of death; that there was no indication of strangulation; but he adds, which is important, that if there had been any such marks on the body, they would have disappeared owing to the decomposition which had set in. Then follows the passage I have alluded to:—"I do not remember whether the Civil Surgeon was in the station on the day I saw the body." The witness was recalled, and he stated further: I examined the bones of the body with my fingers and found that none of them were broken. Now this last statement cannot be reconciled with the report which he made immediately after the body was first submitted for his inspection. It appears to me from this report that the native doctor could not have examined as he says the neck of the deceased, for in his report under the head No. 3 Larynx Trachea, I find the remark "all decomposed." Then again he states that the abdomen was not examined. Then as to the muscles, bones and joints under the heads of Injury, Disease, Fracture, and Dislocation, the words used by him are throughout "none." Now his attention had been particularly directed by the Police to what was their theory of the cause of death, for under the head "Information furnished by the Police," we find that death is said to have been caused by the tying of a rope round the neck. With that information before him, right or wrong, as a guide, it is somewhat strange to find that no remarks are made in his report beyond the words "all decomposed," and yet this very doctor says, when afterwards examined, that the neck-bone was not injured or broken in any way. He also says in his report that the spinal cord was not in any way examined, so that it must, I think, be said in this case that the cause of death has not been satisfactorily established; but it is very clear from the evidence of the witnesses, who were on the spot immediately after the occurrence of the crime, that the body of the deceased was found with marks on the throat, and there is no doubt in my mind that the deceased met with a violent death.

The prisoner Haneef Fakeer, when arrested, was told by the gomasta of the zemindar that he ought to state all that he really knew about the circumstances connected with the crime, and that if he did not do so, it would not be well for him; and the prisoner replied (I take this all from his own statement before the Deputy Magistrate) that when the Police arrived, he would state all that he knew with reference to this crime; and on the 17th of July 1874, the prisoner before the Deputy Magistrate made the following statement. I do not propose to read the whole of the statement, which is a very lengthy one, but I shall refer to the more important portions of it. He commences his statement by saying that early in the month of Assar (the murder of Meheroollah having taken place on the 29th of Assar) Meheroollah had beaten the prisoner's minor step-son, during his (the prisoner's) absence from home; that his son had told him of this on the return of the prisoner to his home; that the prisoner was very much affected with the account given him by his step-son of the treatment he had received at the hands of Meheroollah, the more so as his son's mother was dead; that he was resolved to take revenge on Meheroollah; and that he cherished the idea of paying off Meheroollah ("ইহার ধার উদ্ধার করিব" are the words used) for some time, and we have the evidence of the prisoner's wife that her husband sat in the verandah of the house for two or three days with a stick in his hand waiting for Meheroollah. I must say for myself that I do not quite believe that part of the statement of the prisoner's wife. However, be that as it may, the prisoner admits that he once failed in his attempt to pay off Meheroollah for the injury done to his (the prisoner's) son. Then the statement goes on to say, that "last Sunday, late at night, I "got up in the house in which I was sleeping, went to my cow-house, and fanned the "ashes into a flame" (people of this class are in the habit of keeping fire in this way in their houses); that he fanned it into a flame, and on going for fresh fuel to his hayrick, which is on the west side of the baree, he found on or near it two fishing implements and a chattah; that on seeing

Digitized by Google

these his suspicions were aroused that somebody or other had left these implements in that place and had entered his sleeping house through the back-door, which was open ; that he went into the sleeping-house and saw a person in the house ; that he seized that person, that that person said my name is Meheroollah, that the prisoner asked him why have you come ? and he said I am hungry, I have come to eat rice. The prisoner then said to his wife, Meheroollah has entered my house, and I have seized him, do you light a lamp quickly ? That the wife said let Meheroollah go, and at that time Meheroollah also said to him, give me a few blows and let me go, so that nobody may hear of this matter. Upon this, the prisoner says :—I hit him a blow on the head, and with my right hand I seized his throat and squeezed it and threw him down on the ground ; that Meheroollah rolled out into the courtyard and fell down there ; that the prisoner followed him into the courtyard and placing his right foot upon the neck of Meheroollah pressed it down ; that afterwards he put his hands to the nostrils of the deceased, and discovered, as he no longer breathed, that he was dead, and that excreta were issuing from his anus ; that he then placed the body on his shoulders and took it to the field of Nalya, and placed it under a mangoe tree ; that he then returned towards his house, and that he took the two fishing implements into the field of another man, the field of Munnoo. Strange to say he took the chattah with him to his house, but here it may be remarked that the night was a rainy one, and he kept the chattah perhaps to use it. This confession, as already said, was made on the 17th of July 1874, and the Deputy Magistrate, Baboo Krishna Chunder Dutt, certifies that the confession was taken in his own handwriting (I have all along been quoting from the vernacular to be quite safe) ; that it contains accurately the whole of the statement made by the accused ; and that he believes the confession was voluntarily made.

Subsequently, or on the 31st of July, after the prisoner had been in Hajut for some days, he was again examined by the same Deputy Magistrate ; and on that occasion he in no way retracted his former confession. This subsequent examination was directed to elicit information with reference to a fact upon which the prosecution appears to have relied, namely, that the murder could not have taken place in the house of the prisoner but on the path to the south of the prisoner's, house and whic towards the house, of the deceased. asked therefore whether there was near his house leading to the house deceased, and he admitted that there

Upon this confession, and upon the as to the finding of the body of the in the place, and in the state in whic found, upon the evidence adduced prosecution as to the prisoner's ex determination to inflict some injury deceased, as well as the fact not that the prisoner did deliver to th the chattah of the deceased from his the prisoner was committed by the Magistrate. And again at the time mittal on being asked whether he to call witnesses for defence, the said, "I killed Meher, because he ente "house at night, my wife Moyran "prove this. She is my only w Before the Sessions Court, the w made very much the same statements did before the Deputy Magistrate wife of the prisoner, as might be ex did not make so clear a statement Sessions Court as she did before the Magistrate, with reference to what too in the house of her husband on th of the murder ; but she, in that sta admits that she and her husband, soner, were sleeping in their house ; night she was awoke by hearing her h calling her ; that he told her to get that she heard a noise as if a man wa beaten with fists ; that shortly after h band went outside ; that when she light she did not see her husb the house ; that he returned abou hours after, and said he had beaten oollah ; that they then went to slee she does not know what happened wards. She also stated that Meherool never been to her house before. Her tion was called to what she had before the Deputy Magistrate with re to her having seen her husband sitt two or three days in the verandah house with a stick for the purpose o laying Meheroollah and paying him the assault committed by him prisoner's son ; and she says that she say this before the Deputy Mag Then her attention was called to part of her evidence before the Magistrate, in which she says :—" "latter part of the month (I forget th "about midnight, when I was sleepi "husband called me and told me th

Digitized by Google

"one had entered our house, and that he "had caught hold of him ; he ordered me to "get a light. I got a light, and saw that "the man who had been caught hold of by "my husband was Meheroollah. I told "my husband to let him go. Meheroollah "also asked my husband to let him go after "giving him some beating. Then my "husband struck him twice on his head with "his fist. The light went out, and my "husband and Meheroollah went outside the "house." She was asked whether she had said this, and she said : yes, I said this, I forbade my husband to beat Meheroollah. When I was getting the light they went out. Then a further portion of her evidence was read to her, namely : "one dundo after my "husband came to the house and told me "that he had killed Meheroollah (*budh "koryachi*), and that he had thrown the "body in the jute field of Hedayutoollah." In answer to the Court she said : yes, I said this, it is true. Then she also admits that she said before the Deputy Magistrate that her husband produced the chattah to the Police. Therefore it appears to me clear that this confession of the prisoner Haneef Fakeer, which is a voluntary confession, is substantially supported by the evidence of the wife.

We have now to consider, and this is a very important point in the case, where the murder took place. The learned Counsel, Mr. Ingram, who appears in support of the prosecution, asks the Court to hold that the murder took place on the path or road to the south of the prisoner's house ; that Meheroollah was suddenly attacked by the prisoner ; and that the suddenness of the attack made up for any disparity in the strength of the two men, it being supposed that Meheroollah was a much stronger man than the prisoner, and that he was in some way armed at the time. We have carefully considered this part of the case, for if the murder took place on the road, as suggested by the learned Counsel, and the prisoner was lying in wait to pay off Meheroollah owing to the old grudge he bore against him, then the crime of the prisoner assumes a much graver aspect. I think, after giving the case my most careful consideration, that the occurrence took place inside the house of the prisoner. He could not have known that the deceased had gone to fish in the bheel, for that intention was suddenly formed, and against the remonstrance of the father of the deceased ; much less could he have known when the deceased was likely to return homewards, and therefore it is in the highest degree improbable that he could have been lying in wait for him at that hour of the night. We have then to consider the provocation, if any, which the prisoner received at the hands of Meheroollah, as also the argument of the learned Counsel Mr. Ghose as to whether the prisoner was justified in his act in the exercise of the right of private defence. I have already stated what the prisoner admits in his first confession as having taken place within his house on the night of the murder. My view of the case, after considering the whole of the evidence and all the circumstances connected with it, is this, that the deceased took an opportunity on his way home from Ruttonpore bheel to visit the house of the prisoner's wife ; it was late at night, and he expected that he would find her at that hour. The act was not the act of a person who, as Mr. Ghose suggested, was about to commit the offence of housebreaking, because the deceased left his fishing implements outside the house, thus leaving every thing he had in the shape of arms outside, and entered the house by the backdoor, which for all we know may have been open or left open for him. Naturally the prisoner finding a man under the circumstances described by him in his house, and in his sleeping-room at that time of night, would seize the man. This, it appears, the prisoner did ; but on his doing so, there was an immediate surrender on the part of Meheroollah, as well as abandonment of the intent whatever that intent was that brought him into the house. I think, under the circumstances, I am justified in assuming that he came with the intention of having connection with the wife of the prisoner, but that intention was not carried out ; as already stated, the deceased immediately surrendered himself, gave up his name, and supplicated the prisoner not to do more than to beat him slightly and let him go and not to say any thing more in the matter ; the wife we find interceding for the deceased ; she admits this in the Court of Session when her evidence to this effect before the Deputy Magistrate was read over to her. Therefore, taking the fact of the deceased Meheroollah being caught in the house of the prisoner at that late hour of the night, with the fact of the wife interceding for him, I come to the conclusion that he went there for an improper purpose. I am also of opinion that the provocation given to the prisoner was a grave provocation, but taking all these circumstances into consideration, and making

Digitized by Google

allowance for every extenuating feature in the case on behalf of the prisoner, I do not find in this case that he can claim that what he did was done in the exercise of the right of private defence. There are certain restrictions to that right, which are laid down clearly in Section 99 of the Penal Code. The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purposes of defence; and again under Section 102, the right of private defence of the body (or of the body of a wife) commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence, though the offence may not have been committed, and it continues as long as such apprehension of danger to the body continues. Now there was no continuing act on the part of the deceased, and there could have been no reasonable apprehension in the mind of the prisoner that the deceased would carry out his intent. I therefore think that no such circumstances existed as necessitated the exercise by the prisoner of the right of private defence. Taking the whole case into consideration, and looking at the evidence for the prosecution, particularly that of the wife,—the prisoner's confession,—the unnecessary and brutal violence used,—the marks of that violence found on the body,—the fact that the prisoner removed the body in the most deliberate manner and placed it in the field of another man to throw the blame upon him,—that he removed the fishing implements of the deceased, and placed them in the field of another to throw the blame upon him,—with the fact that although the prisoner does modify his confession before the Sessions Judge, he does not wholly retract it, but sets up a story in that Court that the deceased was caught in his house late at night,—that he suspected him to have come there to have intercourse with his wife,—that he only struck him one blow,—and that the deceased met with his death by falling over the trunk of a tree lying at a short distance from the prisoner's house—a most improbable story, to say the least of it,—I am clearly of opinion that the prisoner is guilty of the offence of culpable homicide not amounting to murder, and I propose to sentence him under Section 304 of the Penal Code to three years' rigorous imprisonment. The prisoner must be re-arrested, and his term of imprisonment will commence from the date on which this sentence may be announced to him by the Sessions Judge.

Morris, J.—I concur generally in the view of the evidence taken by Mr. Justice... It seems to me that the evidence affo... the first confession of the prisoner, c... ated as that confession is by the evi... the woman Moyramee, and by several... who saw and describe the marks of... on the neck and head of the ... Meheroollah on the day following the... rence, brings clearly home to the... the offence of culpable homicide not ... ing to murder. The second confessio... by the prisoner before the Sessions... bears internal evidence of falsity, a... not be believed. It appears also to ha... disregarded by the Sessions Judge. ... regard to the circumstances under wh... prisoner confesses that he killed Mehe... I think a sentence of three years' r... imprisonment will meet the requirem... justice.

The 20th March 1875.

Present:

The Hon'ble J. B. Phear and G. G. ... *Judges.*

Act X of 1872 *s.* 534.

(Miscellaneous Case No. 35 of 187...

Mohunt Luchmi Dass and others, *Peti...*

versus

Pallat Lall, servant of Mr. Crowdie, *O...* *Party.*

Mr. M. M. Ghose and *Baboo Judoo... Sahoy* for the Petitioners.

Mr. M. Sandel for the Opposite P...

An order under s. 534 Criminal Proced... must be founded on a finding that the person ... favor it was made was dispossessed of specific ... able property by the use of criminal force, whi... a material ingredient in the matter of a crimin... tion, and it must in terms restore such pers... property from which he had been dispossessed.

Phear, J.—We think that the ord... plained of is so vague and irregular ... cannot be supported. It certainly i... valid order under Section 530 of the C... Procedure Code; and it is very ... from the order itself to discover th... intended to be an order made in pu... of the provisions of Section 534... foundation of an order under Secti... should be the finding of the Court... effect that the person in whose favor t... is made has been dispossessed of ... immovable property by the use of ...

Digitized by Google

force, which force formed a material ingredient in the matter of a criminal conviction. And when such a finding has been arrived at, the order should be in terms to restore the person, who had been so dispossessed, to the property from which he had been dispossessed. The order which has been brought before us does not, however, in terms profess to restore any body to the possession of any property. It speaks of demarcation of land, and it seems in effect to restrain the person spoken of as the defendant from interfering with that demarcated land. But this is very different from an order such as ought to be under Section 534. Mr. Sandel has pressed upon us that the order ought not to be set aside if its substantial effect is that which is intended by Section 534. And this we are willing to concede to him. If we could discover that the order did in fact restore some one to the possession of immoveable property from which he had been previously evicted by force, we would not allow mere irregularity in form or wording to be sufficient to invalidate it. But we think that this is not the case here. We cannot even discover that the Magistrate has arrived at any finding to the effect that the person intended to be benefited by this order, was turned out of any property by the exercise of criminal force. We have had the record of conviction of Luchmee Dass and others read out to us, and throughout the judgment of the Magistrate, there is nothing that can be reasonably interpreted as a finding of that kind.

We therefore set aside the order.

The 24th March 1875.

Present:

The Hon'ble F. B. Kemp and G. G. Morris, *Judges.*

Enquiry—Registry—Clerk—Act VIII of 1871 s. 80.

(Miscellaneous Case No. 67 of 1875.)

Bunwary Poddar, *Petitioner.*

Mr. M. Ghose and *Baboo Boykunt Nath Dass* for the Petitioner.

An enquiry made by a clerk of a Registry Office, with a view to ascertain whether the person who brings a receipt to take back a document, which could not be returned in the first instance, and for which a receipt was accordingly given, is the person in whose possession the receipt ought to be, is an enquiry within the meaning of the Registration Act VIII of 1871 s. 80.

Kemp, J.—THIS case was sent for by this Bench on the 16th of March, and notice given to the Magistrate. The prisoner was at the same time enlarged on bail of Rs. 150. No body has appeared to support the conviction and sentence. The two grounds urged in appeal, which we think necessary to remark upon are: 1st, that the conviction is bad in law, inasmuch as the statement in question was not made in any proceeding or enquiry within the meaning of Section 80, Act VIII of 1871; and 2ndly, that under the circumstances of this case, assuming the guilt of the prisoner, the sentence is too severe. The first ground of appeal turns upon the meaning of Section 80, Act VIII of 1871, the Registration Act, which is as follows:—"Whoever commits any of the "following offences shall be punishable with "imprisonment for a term which may extend "to seven years, or with fine, or with both; "(*a*) whoever intentionally makes any false "statement whether on oath or not, and "whether it has been recorded or not, before "any officer acting in execution of this Act "in any proceeding or inquiry under this "Act." It has been contended by the learned Counsel that the enquiries made by the clerk of the Registry Office and by the Sub-Registrar, are not proceedings or enquiries coming under the Act, and he has referred us to Section 34 of the Act, which shows the heads of enquiries to which this Section refers, namely, "whether the docu-"ment was executed by the person by whom "it purports to have been executed;" "as "to the identity of the persons appearing "before the Registrar and alleging that they "have executed the document;" and lastly, in the case of persons appearing as representatives, assigns or agents, "as to the "right of such persons so to appear." Now, when a document is registered, it is not always convenient to return it at the time of registration. Documents are kept some times for several days, and a receipt is given to the person entitled to withdraw the document from the Registry Office, the document being afterwards made over to that person on his bringing back the receipt at the time fixed for the re-delivery of the document. We think it cannot be said that the officer of

Digitized by Google

the Registration Department before re-delivering such document, would not be entitled to make some enquiry as to whether the party who brings the receipt is the proper party in whose possession that receipt ought to be. In this case the document registered was a kubooleut executed by one Junglee. The receipt was given to him, and he made it over to the accused. This is admitted by Junglee. The accused took this receipt to the Registrar's Office and demanded back the kubooleut. One of the clerks of the Sub-Registrar's Office demurred about returning the document, because there was no cross opposite the name of Junglee, and he told the accused to make Junglee mark the document with a cross. The story of the clerk is that the accused went out and came back very shortly after with a cross marked on the receipt. He still doubted the authenticity of this cross, and refused to make over the document to the accused. The Sub-Registrar was not at the Office at the time, but came in afterwards, and the matter was reported to him. The Sub-Registrar then asked the accused whether the cross was on the receipt when he first brought it to the Office, and he replied in the affirmative. This has been found on the evidence to be a false statement, and the accused has been convicted under Section 80, Act VIII of 1871, and sentenced to two years' rigorous imprisonment. We are not prepared to say that the enquiry made by the Sub-Registrar in the matter of this receipt was not an enquiry under this Act, but we think, looking to the fact that Junglee admits that he authorized the accused to receive back the kubooleut, and that he also admits, although not very clearly, that he put a mark upon the receipt, that the sentence is much too severe and quite out of proportion to the offence committed by the accused. Under Section 297, we have the power of altering a sentence if we consider it manifestly too severe. In this case we are of this opinion; and as it appears that the accused has already been in jail from the 4th of February to the 15th of March, when he was enlarged on bail by this Court, we think he has been sufficiently punished, and we direct that he be discharged from his bail recognizances and set at liberty.

The 31st March 1875.

Present :

The Hon'ble F. B. Kemp and G. *Judges.*

Prisoner—Witnesses—Act X of 18

The Queen

versus

Prosunno Coomar Moitro, *Appe*

Committed by the Magistrate, and the Sessions Judge of East on a charge of committing forg

Baboo Boido Nath Dutt for the

Under s. 363, Code of Criminal Procedure, is entitled as a matter of right to have an named in the list which he delivers to the summoned and examined.

Kemp, J.—THE learned Coun appears for the prisoner who has b by jury, points out that two witnes by the prisoner, *viz.*, Kartick Chu and Ramnidhee Mohapatro, who are to be found in the list give the prisoner of the witnesses wished to call and have examine Sessions Court, have not been exa the Judge in this case. He shows record that a summons issued attempted to be served on the witn nidhee, but the return shows that h to be found. No summons, howev or was served on the other witnes Chunder Bose. The Judge re adjourn the trial on account of the no ance of these witnesses for the The learned Counsel contends prisoner was entitled as a matter o have these two witnesses examin especially as at the time of the pleader for the prisoner took t objection and pleaded for an adjou order that these witnesses might be Under Section 363 of the Code of Procedure, we think that the pris entitled, as a matter of right, to witnesses, named in the list w delivered to the Magistrate, summ examined. In the present instanc the two witnesses named in the list served with a summons at all; and, a the other, the Judge has not deter the exercise of his judicial di

Digitized by Google

whether there were valid grounds for dispensing with his attendance. We are therefore of opinion that the non-examination of these witnesses by the Sessions Judge was an error of law. Accordingly, under the provisions of Section 282, we direct the Sessions Judge that he do take the evidence of these two witnesses and certify the same to this Court with the least practicable delay. The prisoner will be released on the same bail as that on which he was held at the time of trial.

The 5th April 1875.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Disobedience of Order—Public Servant—Act XLV of 1860 *s.* 188—*Local Nuisance—Market Dues—Act X of* 1872 *s.* 518.

Reference to the High Court under Section 295 *of the Code of Criminal Procedure by the Officiating Sessions Judge of Sarun.*

The Queen

versus

Subun Singh and others, *Petitioners.*

Baboo Juggadanund Mookerjee, Government Pleader, for the Prosecution.

To support a conviction, under s. 188, Penal Code, there must be evidence that the order has been promulgated by a public servant lawfully empowered to promulgate such order.

Section 518 of the Code which relates to local nuisances has no application to a case like this which refers to the collection of market dues.

Kemp, J.—This case was referred to us by the Sessions Judge of Sarun, under the provisions of Section 295, recommending that the summary conviction and sentence passed by the Assistant Magistrate be quashed. The parties abovementioned were charged with the disobedience of an order duly promulgated by a public servant under Section 188 of the Indian Penal Code. The finding and the offence proved are "guilty of disobedience of an order duly promulgated by a public servant under Section 188," and the sentence was the maliks Subun Singh, Busdeo Singh, Sheo Sahoy Singh, and Tiluck Singh, do pay a fine of Rs. 100, or be simply imprisoned for seven days each. On the putwaree Bhasee Lall the sentence was to pay a fine of Rs. 50, or be simply imprisoned for the same period. It appears that a constable of Police intimated to the Magistrate that the four first named accused, through their putwaree Bhasee Lall, were in the habit of levying tolls in a market. The intimation was given some twenty days after the levy of the toll. The Assistant Magistrate took action on the information given by the constable. The Assistant Magistrate says that it is quite clear to him that the four first defendants levy tolls in this bazar by means of their putwaree; that they have disobeyed his order, and by such disobedience have caused annoyance to persons lawfully employed, namely, the shopkeepers at the market. The Assistant Magistrate then says that he intends to inflict a severe fine, "because it is not every day that the levy of illegal toll can be detected." These are the words of the Assistant Magistrate. To support a conviction under Section 188 of the Indian Penal Code, there must be evidence that the order has been promulgated by a public servant, and that such public servant was lawfully empowered to promulgate such order; and further that the parties convicted were cognizant of such order. When this case came before us on the 3rd of March, we remarked that the order of the Magistrate which the constable speaks of as compelling him to interfere, and which the Assistant Magistrate cites as justifying his order, was not before us, and that it was necessary that we should see what the terms of that order were before pronouncing an opinion in the case. The Magistrate was, therefore, directed to forward a copy of the order referred to. We also thought that an opportunity should be given to the Legal Remembrancer to appear in support of the conviction, and a notice was served on him through the Government pleader. The Government pleader has appeared to-day in support of the conviction, and he has contended that the conviction can be supported under the provisions of Section 518 of the Code of Criminal Procedure. An Urdu translation of a "yâddasht," No. 1644 of the 22nd of July 1873, is sent up as the order justifying the Assistant Magistrate's proceedings. This document purports to be an abstract or translation of some order dated the 22nd of July 1873, and bearing No. 1644. The original of this yâd-dasht is not before us. If it is (as suggested by the Government pleader) a translation of a Government Resolution, no such Resolution is to be found in the

Digitized by Google

Government Gazette. Therefore, in the absence of any order promulgated by a public servant lawfully empowered to promulgate such order, the conviction, under Section 188 of the Penal Code, cannot be sustained.

With reference to the application of Section 518 of the Code of Criminal Procedure, we may observe that the Assistant Magistrate does not refer to this Section. Section 518 (see Explanation I appended thereto) "is intended to provide for cases where a speedy remedy is desirable, and where the delay which would be occasioned by a resort to the procedure contained in Section 521, and the next following Sections would, in the opinion of the Magistrate, occasion a greater evil than that suffered by the person upon whom the order was made, or would defeat the intention of this Chapter."

Chapter XXXIX is for the prevention of local nuisances and we fail to perceive how the collection of market dues can come under that category.

The conviction and sentence passed by the Assistant Magistrate are quashed, and we direct that the fines levied be returned to the parties mentioned above.

The 6th April 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Disputed Possession—Security to keep the Peace—Discretion—Magistrate—Act X of 1872, ch. XL.

(Miscellaneous Case No. 79 of 1875.)

Kali Prosunno Roy, *Petitioner.*

Mr. C. Jackson and *Baboo Ashootosh Dhur* for the Petitioner.

The holding of an enquiry, under Chapter XL of the Code of Criminal Procedure, is a matter entirely within the discretion of the Magistrate of the district or of a division of a district, and the High Court has no authority to require him to proceed under that Chapter. The taking of security for keeping the peace is also a matter within the discretion of the Magistrate, provided that he has materials upon which to proceed.

Jackson, J.—It certainly would appear that, in this case, the preferable course for the Magistrate to take would have been to hold an enquiry under Chapter XL of the Code of Criminal Procedure; but the holding of such enquiry is a matter entirely within the discretion of the Magistrate of the district or of a division of the district, and this Court has no authority to require him to proceed under that Chapter. On the other hand, the taking of security for keeping the peace is also a matter within the discretion of the Magistrate, provided that he has materials upon which to proceed. We cannot say that there was no ground for calling upon the petitioner to give the security, but it also appears to us that the Magistrate has scarcely adverted sufficiently to the position of advantage in which the opposite party was placed under such circumstances by calling upon the petitioner only to give security. We think it were well, if adverting to the whole circumstances the Magistrate had either taken action under Section 530 or called upon the other side also to give sureties of the peace, so that the position of the parties might be kept *in equilibrio.* The present application must be refused.

The 8th April 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Murder — Culpable Homicide—Defence—Postponement—Witnesses—Act X of 1872 s. 251.

The Queen

versus

Jumiruddin and Faizuddin, *alias* Fagoo, *Appellants.*

Committed by the Magistrate, and tried by the Sessions Judge of Dacca, on a charge of being members of an unlawful assembly.

A Sessions Judge is bound to decide whether the offence committed is murder or culpable homicide not amounting to murder, even if the person who struck the fatal blow is not under trial.

If an accused has not his witnesses present, the Judge should, under s. 251, Criminal Procedure Code, if he sees grounds for proceeding, first call upon him for his defence, and then postpone the case.

McDonell, J.—Taking all the facts into consideration, we see no reason for interfering with either the finding or the sentence in this case.

The Sessions Judge was wrong in hesitating to decide whether the offence committed was murder or culpable homicide not amounting to murder, because the man who struck the fatal blow was not under trial. He was bound to decide on the evidence before him what offence had been committed.

Digitized by Google

Of course, this point will receive further enquiry, should the accused, who has absconded, be hereafter apprehended; but if the Judge's view of the law were correct, then in every case in which the principal offender had died before trial, or had continued to evade justice, no decision could be arrived at as to what offence his accomplices or abettors had committed.

We observe that the Judge has purposely omitted to record the defence of Danesh, one of the accused, who was before the Court, but whose witnesses were not present. The Judge's order is as follows:—"This man's defence must be taken hereafter when the summonses are returned." Now, under the provisions of Section 251 of the Criminal Procedure Code, the Judge, if he considered that there were grounds for proceeding, should at once have called on Danesh to state his grounds of defence; and then, if necessary, he could have postponed the case, and given time to the accused to produce his witnesses.

The 31st March 1875.

Present:

The Hon'ble F. B. Kemp and G. G. Morris, *Judges.*

Dacoity—Riot—House Trespass—Act X of 1872 s. 445.

The Queen

versus

Salamut Ali and others, *Appellants.*

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Gya, on a charge of criminal house-trespass.

Moonshee Mahomed Yousuff for the Appellants.

A prisoner charged with dacoity and riot and acquitted cannot be convicted of house-trespass, if the latter charge was not read out or explained to him and he was not called on to plead to it.

Morris, J.—The prisoners were charged with committing the offence of dacoity (Section 395) and of riot (Section 148). The Sessions Judge and the Assessors have agreed in acquitting them of these charges; but the Sessions Judge being of opinion, that the evidence established the commission of the offence of house-trespass, under Section 452, Penal Code, has convicted them under that Section, and sentenced them to two years' rigorous imprisonment. No separate charge under Section 452 was drawn up or read and explained to the prisoners as required by Section 445 of the Criminal Procedure Code, nor can it be said that the offence of house-trespass, as described in Section 452, Penal Code, is *any part of the charge* either of dacoity or of riot. The prisoners have thus been convicted of an offence to which they were never asked to plead, and which they have never had an opportunity of properly rebutting. They have, therefore, been materially prejudiced in this trial, and the conviction and sentence passed upon them must be set aside. Nor upon a consideration of the entire evidence which has been read to us do we think that a new trial ought to be had upon a charge amended under Section 452. The Sessions Judge and the Assessors so entirely disbelive the witnesses who depose to facts which constitute the offence of dacoity and riot, that it would be extremely unsafe to accept that part of their evidence which goes to prove a charge of criminal house trespass. We, therefore, set aside the sentence passed by the Sessions Judge, and direct that the prisoners be discharged.

The 6th April 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Procedure—Judgment by Judge who heard the evidence.

Committed by the Magistrate, and tried by the Sessions Judge of Cuttack, on a charge of committing forgery.

The Queen

versus

Rughoonath Dass, *Appellant.*

Baboo Juggut Chunder Banerjee for the Appellant.

It is a general principle that judgment must be delivered by the Judge who has heard the evidence.

Jackson, J.—On the hearing of this appeal it came to our knowledge that the prisoner has been convicted and sentenced by the Sessions Judge of Cuttack, Mr. J. F. Browne, in pursuance of a judgment delivered by that gentleman on the 15th January 1875, the proceedings in the trial having taken place before, and the evidence having been recorded by Mr. J. B. Worgan, who was then officiating as Sessions Judge of that district. The Sessions Judge,

Digitized by Google

Mr. Browne, adverts to this circumstance in the conclusion of his judgment, and considers himself justified in passing judgment on the ground that the prisoner had consented to it, and because, as he observes, there is no specific rule of law on the subject. It is, I think, a general principle that judgment must be delivered by the Judge who has heard the evidence. In this country criminal trials take place in the Court of Sessions according to the decision of the local Government, sometimes before juries and sometimes with the aid of assessors, and where the trial takes place with the aid of assessors, the judgment rests entirely with the Sessions Judge. Chapter XXIV of the Code of Criminal Procedure contains special rules of evidence in criminal cases, and one of those rules is contained in Section 328, which provides :—"Whenever any Magis-"trate, after having heard part of the evi-"dence in a case, ceases to exercise jurisdic-"tion in such case, and is succeeded by "another Magistrate who has and who exer-"cises jurisdiction in such case, such last "named Magistrate may decide the case on "the evidence partly recorded by his predeces-"sor and partly recorded by himself, or he "may re-summon the witnesses and com-"mence afresh." But a judgment so arrived at is considered by the framers of the Code to be of such infirmity that it is liable to be set aside by a Court of appeal or revision before which the case may be brought, or in cases tried by Magistrates subordinate to the Magistrate of the District, by the Magistrate of the District, without appeal, provided that such Court or Magistrate is of opinion that the accused person has been materially prejudiced thereby. This rule, contained as I said, in the 24th Chapter of the Code of Criminal Procedure, comes in that Code after the Chapter relating to trials in the Court of Sessions, and by its wording, independently of the ordinary principles, seems expressly to exclude the exercise of such powers by the Sessions Judge. It appears to me, therefore, that notwithstanding the prisoner's consent, the conviction and sentence in this case being passed by the Sessions Judge before whom the evidence was not taken, is bad and illegal, and must be set aside, and there must be a new trial. Even this Section, 328, as remarked by one of the editors of the Procedure Code, does not go so far as to say that when one Magistrate has heard the whole of the evidence, another Magistrate may convict on that evidence.

The 8th April 1875.

Present :

The Hon'ble Louis S. Jackson and McDonell, *Judges.*

Code of Criminal Procedure (X of 18 —Construction — "Occupation of Liability of Owner or Agent.

Reference to the High Court Sessions Judge of Moorsheda

In the matter of Mudhoosoodun Chuckerbutty

The duty imposed by Act X of 1872, s village headmen, &c., of giving information occurrence of any sudden or unnatural intended to apply only when such occurr place at or near the village of which he is h in which he owns or occupies land, &c.

Residence in a dwelling-house belonging is not occupation of land within the mean Section.

The liability of the resident agent of under the Section, arises when the owner is n and has no personal knowledge of the fact be reported ; where the owner has such kno liability attaches to him.

Jackson, J.—This case was br our notice, and we thought it righ for the proceedings, inasmuch as the tion of one of the three accused, *viz.*, Soodun Chuckerbutty, was made the of a reference by the Joint Magist in concurrence with him by the M of the District with a view to Mudh Chuckerbutty being dismissed from fession of Mooktear on the ground conviction. It appears that a you named Chunder Kant Chand, who adopted son of one Surossuttee Das upon her premises, and died under stances which induced in the min Joint Magistrate a suspicion of fo No sufficient evidence on that h forthcoming, and therefore no charg kind could be sustained, but the M being of opinion that Surossuttee Da her Dewan Dinonath Sen and also th tear Mudhoosoodun Chuckerbutty can the terms of Section 90 of the Criminal Procedure, and were cons bound to give information to the Police station of the sudden and u death of this Chunder Kant, convict under Section 176 of the Indian Pe and directed Surossuttee and Dino pectively to pay a fine of Rs. 5 Mudhoosoodun to pay a fine of The 90th Section of the Code of Procedure imposes upon every villa man, village watchman, owner or oc

Digitized by Google

land, or the agent of any such owner, or occupier, the duty of communicating to the nearest Magistrate or to the officer in charge of the nearest Police-station any information which he may obtain respecting certain matters the last of which is the occurrence of any sudden or unnatural death. The first of the cases enumerated, of which information is to be given is the residence of any notorious receiver or vendor of stolen property *at the village* of which he is headman or watchman, or in which he owns or occupies land, or collects rent or revenue as the case may be. The next is the resort to any place within *the limits of such village* of any person or persons known or reasonably suspected of being a thug or robber. The third is the commission or intention to commit *suttee* or other non-bailable offence *at or near such village*, and the fourth is the matter already enumerated. No doubt the words "at or near such village" are not added, but by the nature of the case they must evidently be intended, for the Legislature could never have meant that a person by the mere circumstance of his being the owner or occupier of land anywhere or the agent of any such owner or occupier would be bound to give information in respect of the occurrence of any sudden or unnatural death, occurring in a remote part of the country from where the land was owned and held. That however seems to be the view taken by the Joint Magistrate, because he says :—"Surossuttee Dassee is an owner "or occupier of land, and as such was bound, "under Section 90, Code of Criminal Pro- "cedure, to furnish information to the nearest "Magistrate or to the officer in charge of "the nearest Police-station." It does not appear (in fact, the contrary appears,) that Chunder Kant's death occurred at or near any village or land in the ownership or in the occupation of Surossuttee. On the contrary it occurred in a dwelling-house which belonged to her mother in which she resided. That cannot I think be what is meant by occupation of land. But not content with fining her who was in his view the owner or occupier of land, the Magistrate has gone on to fine the Dewan. It seems clear enough that the liability of the resident agent of an owner arises when the owner is not resident and has no personal knowledge of the fact; where he has such knowledge the liability no doubt attaches to the owner. But least of all could the liability in this case attach to Mudhoosoodun Chuckerbutty. He was not the agent of Surossuttee *quoad* any house or land but was a Mookhtear occasionally employed by her for the purpose of conducting business in Court. It is clear that, if liability of that sort could attach to him, it could equally attach to any vakeel whom she might employ for the purpose of conducting litigation. The Legislature certainly never intended that, and it would be tyranny to carry the liability beyond the manifest intention of the law. We think the penalties inflicted on all these persons have been improperly inflicted, and that the conviction must be set aside, and the fines, if levied, must be refunded. With that case there is an end of the reference for dismissing Mudhoosoodun Chuckerbutty from the profession of Mookhtear.

The 8th April 1875.

Present :

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Grievous Hurt—Act XLV of 1860 *ss.* 325 *&* 335.

Reference to the High Court under Section 21 *of Act XI of* 1874 *by the Officiating Additional Sessions Judge of* 24-*Pergunnahs.*

The Queen

versus

Lukhinarain Agoori.

Where a prisoner was charged under the Indian Penal Code, ss. 304, 325, and 323, and the jury brought in a verdict of guilty under s. 335: HELD that he was not acquitted of grievous hurt, but found guilty of the offence described in s. 322 with the extenuating circumstance which would confine the punishment within the limits specified in s. 335.

Reference.—DECEASED died from the effects of a severe blow on the head, and the accused was charged under Sections 304, 325, 323 : the jury disbelieved the prisoner's story (*viz.*, that he did not strike the blow at all), and brought in a verdict of guilty under Section 335, which was not included in the charge.

I did not then think that I could accept that finding and pass sentence under Section 335 ; but, on further consideration of Section 457, Criminal Procedure Code, Illustration (*b*), I am now disposed to change my opinion ; and should the Court permit me to do so, I would propose to convict the accused under Section 335 and pass a sentence of one year's imprisonment.

Digitized by Google

If the verdict of the jury be taken as amounting to a declaration that accused is not guilty of any offence, then I have to submit that on the evidence the conviction ought to be under Section 325. The provocation was neither grave nor sudden: the abuse was mutual, and the accused had time for deliberation, since he went to his house and fetched out the bamboo with which he struck the blow:—he might have remained in the house, but he advanced (according to the evidence) even further than the place where he had been standing before.

Judgment of the High Court.

Jackson, J.—It appears to us that the Judge, as he now seems to think, has referred this case under a misapprehension.

The offence of which the jury found the accused guilty was that of grievous hurt, and that offence is punishable in two degrees according to the absence, or the presence, of mitigating circumstances, as provided in Sections 325 and 335.

The jury did not acquit the prisoner of grievous hurt; but, on the contrary, found him guilty of the offence described in Section 322, but went on to find the extenuating circumstance which would have the effect of confining the punishment within the limits specified in Section 335.

The record may be returned.

The 8th April 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Procedure—Possession—Decision by Officer who takes Evidence—Act X of 1872 *s.* 530.

Reference to the High Court under Section 296 *of the Code of Criminal Procedure by the Sessions Judge of Backergunge.*

Guru Churn Sen, 1*st Party*,

versus

Kali Nath Dass Biswas, 2*nd Party.*

In a case under s. 530, Code of Criminal Procedure, the High Court set aside the proceedings of a Deputy Magistrate, who, on succeeding his predecessor who had gone into the case, instead of recalling the witnesses *de novo*, and examining them himself, decided the question of possession on the evidence which had been taken by his predecessor.

Reference.—This is the same case which was referred to the Court by my predecessor in his letter No. 42, dated 2nd September, 1874. It is a case of disputed possession of certain lands between the petitioner Guru Churn Sen on one side, and Kally Nath Dass Biswas and others on the other. A late Deputy Magistrate of Perozepur, Moulvie Obedulla, brought this case under Section 530 of the Code of Criminal Procedure, on the report of a Police officer, apprehending a breach of the peace in consequence of the dispute between the two contending parties. He subsequently dismissed it without deciding the question of possession, and, as this order was illegal, the case, on a motion by Kally Nath Dass Biswas and others, was referred to the High Court, when the Court, by orders dated 11th September 1874, copies of which are filed with the record of the Deputy Magistrate, set aside his orders, and directed him to enquire and decide which party is in possession of the land in dispute.

In consequence of the transfer of the Deputy Magistrate, Moulvie Obedulla, who instituted the proceeding under Section 530, his successor took up the case; and, without summoning or examining the witnesses *de novo*, decided on the evidence recorded by his predecessor, and directed that the 2nd party, Kally Nath Biswas and others, should be maintained to hold possession of the disputed land till ousted by a decree of a Court of proper jurisdiction.

I think that the Deputy Magistrate's proceedings are certainly irregular. He ought to have called for the witnesses *de novo* and decided upon the question of possession on evidence taken before him. The words of the law are too clear to allow of any evasion. "The question of possession must be decided on evidence taken before the Magistrate." These words are not to be found in the old law, but they are in the new Criminal Procedure Code, *vide* explanation Section 530, and every Magistrate is bound to act up to the law, and I consider that the Deputy Magistrate's irregularity of procedure must be fatal to his order. My reasons are detailed in my order dated 10th instant, forwarded with the record, and I recommend that the Deputy Magistrate's order, putting the 2nd party in possession, be set aside, and I would beg to suggest that, with the order setting aside the Deputy Magistrate's proceedings, the case might be allowed to drop, as there is nothing in the records to show that any proceedings should be taken in the interests of the public peace.

Digitized by Google

Judgment of the High Court.

Jackson, J.—We think, for the reasons stated by the Sessions Judge, that the order of the Deputy Magistrate made upon evidence not taken before him must be set aside. We do not think it necessary to give any further direction in the matter.

The 14th April 1875.

Present:

The Hon'ble Louis S. Jackson, and W. F. McDonell, *Judges.*

Fence—Fine—Information.

Reference to the High Court under Section 296 of the Code of Criminal Procedure by the Officiating Magistrate of Hooghly.

The Queen

versus

Shadhu Churn Ghose.

No order fining a party for not repairing a fence ought to be passed without an information against him and a hearing.

Reference.—I HAVE the honor to state I am of opinion that an order of the Assistant Magistrate passed yesterday in the case of Queen *versus* Shadhu Churn Ghose, the record of which accompanies this, is illegal, as no previous order to repair their fence had been issued to the East Indian Railway Company, and to request that it may be quashed.

I also beg to be informed whether the words 'good and sufficient' in Section 20 Act XVIII of 1854 cannot be predicated of the ordinary iron wire fence which bounds the East Indian Railway line along most of its length, although it may allow of small animals, if not watched by any one in charge of them, pushing their way through them. It seems to me an important matter that should be settled.

Judgment of the High Court.

Jackson, J.—The Railway Company ought not to have been fined without an information against them and a hearing.

Nor does it appear that there was any defect in their fence, though it is *suggested* by Shadhu Churn, the owner of the sheep, *when on his defence*, that, in the place indicated, the earth below the undermost bar of the fence had been washed away. Supposing this to have been proved, as it was not, the circumstance would have afforded a ground for ordering the Company to repair, and on their failure to comply with such order being proved, the Company might have been fined.

The order must be quashed, and the award of the fine by way of compensation was wholly irregular, and as there was no prosecution and no complaint on the part of the owner of the sheep, the fine must therefore be repaid to the Company.

The 14th April 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Irregularity—Complaint—Dismissal—Acquittal—Act X of 1872 ss. 205 and 212.

Reference to the High Court under Section 296 of the Code of Criminal Procedure by the Sessions Judge of 24-Pergunnahs.

The Eastern Bengal Railway Company,

versus

Kali Dass Dutt and another.

The omission to comply with prescribed formalities before issuing the summons will not vitiate the proceedings after summons so as to enable a complainant to re-open the case.

The dismissal of a complaint under s. 205 operates as an acquittal by reason of s. 212 Code of Criminal Procedure.

Reference.—A WRITTEN complaint was preferred against two persons Madhub Chunder Dutt and Kalidas Dutt by the Superintendent of Police on behalf of the Eastern Bengal Railway Company charging them with offences against the Railway Law, Act XVIII of 1854.

The Cantonment Magistrate did not examine the complainant but issued summons for the trial of the case on the 5th February. The case was postponed till the 6th idem at the complainant's request, and on that day the Cantonment Magistrate dismissed the complaint under Section 205 Criminal Procedure Code.

On 10th idem the complainant made a fresh complaint, which was admitted by Mr. Davies, Deputy Magistrate temporarily in charge of the Cantonment Magistrate's office. His order is as follows :—

"I find that no complaint was legally made as required by Section 144 Criminal Procedure Code, and that no complainant was examined, and as a written complaint has this day been filed and complainant examined, I place the complaint on the file to be tried in due course."

Proceedings having been taken against the accused, they have applied to this Court

Digitized by Google

for an order of reference. It appears to me that Mr. Davies' order of 10th March was illegal, and that further proceedings should be stayed.

Colonel Wintle was acting legally in receiving the written complaint of the 25th January and in issuing summons upon it. If he omitted to examine the complainant the trial of the accused was not prejudiced by the irregularity. *Vide* Section 144 last para.

His order dismissing the complaint under Section 205 was a perfectly legal one, and by the effect of Section 212 it operated as an acquittal of the accused.

In fact whether his order was right or wrong it was a judicial acquittal of the accused, and could only be set aside upon appeal referred in the manner laid down in Section 272 Criminal Procedure Code (*vide* XIX W. R., 52, Criminal Rulings, J. G. Bagram, Petitioner).

I therefore move the Court to set aside the order of 10th March and to quash the subsequent proceedings.

Judgment of the High Court.

Jackson, J.—We concur in the view taken by the Sessions Judge. The omission to comply with prescribed formalities before issuing the summons will not vitiate the proceedings after summons so as to enable the complainant to re-open the case, and the Magistrate having dismissed the complaint in accordance with Section 208, the principle laid down in Section 212 applies. The complainant cannot, under such circumstances, be in a better position than he would have been if he had been allowed to withdraw the complaint under Section 210.

The proceedings subsequent to Mr. Davies' order and that order itself are annulled.

We add for the Magistrate's guidance that he should not permit himself to be addressed, in connexion with cases before him, in the style adopted by the Superintendent of Eastern Bengal Railway Police.

The 14th April 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

High Court—Revision—Difference of Opinion between Magistrates.

Reference to the High Court under Section 296 of the Code of Criminal Procedure by the Officiating Magistrate of Backergunge.

Nundo Kishore Haldar

versus

Anundo Chunder Chatterjee and oth

The difference of opinion on a question of proof a Magistrate who did, and another who did not, witnesses, is not a ground on which the High C be disposed to exercise its powers of revision.

Reference.—This is a case under S 379 Indian Penal Code. The comp filed a petition to the effect that the entered his land and cut and carried the paddy sown by him on it. Sub-I Magistrate, Baboo Chundra Kumar sent the complaint for Police investi and the Police reported it to be true Sub-Deputy Magistrate thereafter s and examined five witnesses, and the moned the accused and six more wi Four of these witnesses depose to hav the commission of the offence, and th two to have heard of the occurrence Sub-Deputy Magistrate dismissed th on the ground that the witnesses ex by him appeared to him to have give evidence. In my opinion the case h sufficiently proved, and there has failure of justice. There is distinct e to show that the complainant was at t of the occurrence in possession of the and that he prepared and tended th which the accused by violence cut and away.

Judgment of the High Court.

Jackson, J.—The ground of refere this case is a difference of opinion question of proof between a Magistrat did, and another who did not, he witnesses.

It is not a ground on which the Cou be disposed to exercise its powers of re

---

The 14th April 1875.

Present:

The Hon'ble Louis S. Jackson and McDonell, *Judges.*

Compensation — Distress — Imprisonment- rant—Act X of 1872 s. 209.

Reference to the High Court under S 296 of the Code of Criminal Pro by the Magistrate of Moorshedaba

Bisheshwar Shaha, *Complainan*

versus

Bishwambhur Sirear and others

Digitized by Google

A Magistrate in making an order for compensation under s. 209 Code of Criminal Procedure, is bound, if the amount be not paid, to proceed to the recovery of it by distress and sale of the moveables of the person ordered to pay; but if such person admits he has no goods, and thereby waives the right to have the amount levied by distress, the Magistrate may proceed to imprison him in the Civil Jail. The warrant of distress cannot have currency simultaneously with the imprisonment.

Reference.—THE complainant in his petition charged the accused with having committed the offence of wrongful confinement (Section 342) and assault (Section 352 of the Code). The charge was, however, enquired into by the Joint Magistrate under Section 341 of the Code, and was dismissed.

Besides dismissing the case, the Joint Magistrate, considering the complaint to be frivolous and vexatious, ordered the complainant, under Section 209 of Act X of 1872, to pay Rs. 10 as amends to the defendant summoned, and on the complainant's statement that he had no property whereon the distress could be levied, directed that a warrant be made out for his imprisonment in the Civil Jail, and also the issue of a distress warrant in case property should be found. It appears to me that the order of simultaneous issue of warrants for imprisonment and for distress is illegal.

The provisions of Clause 3 of Section 209 of Act X of 1872 seem to indicate most clearly that, when an order of compensation has been passed under that Section, an attempt must be made to realise the amount by distress and sale of moveable property before resort is had to imprisonment in the Civil Jail in default, or at any rate that, if the Magistrate is satisfied that there is no property on which the amount of compensation can be levied, and imprisonment is therefore ordered in default, no distress warrant can issue.

With regard to para. 8 of the explanation of the Joint Magistrate, which is sent herewith, it appears to me that the concluding words of Section 209 of Act X of 1872 do not bear the meaning which he would attach to them. They seem to me to relate to cases in which, though the Magistrate may be unable to discover any moveable property on which distress can be made to secure payment of the compensation, the person liable or his relations or friends may pay the amount in order to procure his release from confinement.

Judgment of the High Court.

Jackson, J.—We are of opinion that a Magistrate in making an order for compensation is ordinarily bound, if the amount be not paid, to proceed to the recovery of it by distress and sale of the moveables of the person ordered to pay; but if such person admits that he has no goods, and thereby waives the right to have the amount levied by distress, the Magistrate may proceed to imprison him in the Civil Jail, and the imprisonment will run out the term ordered, unless the sum be sooner paid, that is, unless the imprisoned person pays it.

The warrant of distress cannot have currency simultaneously with the imprisonment, because the alternative permitted in case of failure to realise has already been adopted.

So much of the Joint Magistrate's order therefore as directs the simultaneous issue of the warrant of distress will be annulled.

The 23rd April 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Grievous Hurt—Comments on Conduct of Police Officers—Sessions—Judgment—Act XLV of 1860 *ss.* 320 *&* 325.

The Queen

versus

Budri Roy, *Appellant.*

Committed by the Magistrate and tried by the Sessions Judge of Tirhoot on a charge of voluntarily causing grievous hurt.

Baboo Juggudanund Mookerjee, Junior Govt. Pleader, for the Prosecution.

To make out the offence of voluntarily causing grievous hurt under s. 325 Penal Code, there must be some specific hurt, voluntarily inflicted, and coming within some of the eight kinds enumerated in s. 320.

For the purposes of a judgment in Sessions trials, the testimony or conduct of Police Officers concerned should be scrutinized and commented on in the same degree as those of other material witnesses, and not further.

Jackson, J.—THE facts of this case are in truth very simple.

The case for the prosecution was that Budri Rai, the prisoner, having seized, on account of a failure in carrying out a contract for indigo cultivation, some cattle belonging to the deceased, Foujdar, the latter interposed, and that a scuffle ensued, in the course of which the prisoner struck Foujdar a blow or gave him a violent push on the

Digitized by Google

back of the neck, which almost immediately caused his death.

The story for the defence differs in this, that Foujdar is said to have been running after the prisoner, to have slipped or stumbled and fallen, and to have died of epilepsy.

The Sessions Judge considered the former version of the matter established by the evidence; but he acquitted the prisoner of culpable homicide, and found him guilty of causing grievous hurt, on which count the sentence passed was two years' rigorous imprisonment.

The prisoner appeals, but is not represented by Counsel. His petition impugns the credibility of the evidence, and the *bona fides* of the investigation, a subject which has received very full comment from the Court of Session.

We think, however, there can be no reasonable doubt of the correctness of the Judge's conclusion as to his choice between the two stories put before him, and we are satisfied that the death of Foujdar was directly brought about by violence on the part of the prisoner.

But we also think the conviction under Section 325, Indian Penal Code, cannot be supported.

To make out the offence of voluntarily causing grievous hurt, there must be some specific hurt, voluntarily inflicted, and coming within some of the eight kinds enumerated in Section 320.

In the case before us there is no evidence to show what kind of hurt was caused, or how precisely the death of Foujdar was brought about. His body was burned by his friends, the matter was hushed up, and consequently no *post mortem* examination took place, or was possible. Indeed the Judge himself mentions among the "difficulties not cleared up to his satisfaction, the degree and circumstances of the violence used by Budri Rai in beating the deceased." Nor throughout his judgment has he used any language more precise, in describing the death of Foujdar, than "a scuffle in which he met his death," or a reference to that death having been "violent" "or sudden."

If indeed, on the evidence showing that a young man (not quite adult) apparently in perfect health, had received a violent blow and died almost instantly, there being no proof of previous latent ailment, the J connecting cause and effect, had fou prisoner guilty of culpable homicid amounting to murder, the conclusion have been more logical.

But stopping short of this he says, the hurt was grievous has been sho the suddenness of the death."

That, however, is not the case, unl Judge merely means that if the lad d the blow, it must have been a violent which is not the same thing as the te thing called grievous hurt.

The deceased, for ought we know have had heart disease, and may hav from the excitement of the quarrel ; may have had a diseased spleen, and t may have ruptured it, and in either cases, though there would be hurt, would be no grievous hurt voluntari flicted.

For these reasons we are of opini the conviction must be for hurt alon that the sentence should be reduced to ous imprisonment for one year.

The Junior Government Pleader instructed in this case, we have asce that he has nothing to urge against t dification of the finding and sentence.

In making our order upon this app are obliged to remark upon the ino length of the judgment delivered Court below, a prolixity not due intricacy or difficulty in the facts, but entirely to the Judge having gone out way to comment on the proceedings, n of the committing Magistrate, but also Police Officers concerned, upon which the Judge has entered, as it seems to a wholly needless controversy—wi result, that we find appended to the re this Sessions trial, a lengthy memo or report by the Magistrate of the dated several weeks after the decis which, after a local enquiry, that upholds and justifies the conduct Police, impugned in the judgment Court of Session.

We consider that, for the purpos judgment in Session trials, the testim conduct of Police officers concerned be scrutinized and commented on in t degree as those of other material wi and not further.

Digitized by Google

RULES AND ORDERS OF THE HIGH COURT.

Circulates Financial Department Resolution of 29th October 1874, *relating to the cancellation of Stamps under Section* 30 *of the Court Fees Act.*

CIRCULAR ORDER No. 24.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, dated the 7th December 1874.

(English Department.)

(Civil.)

THE annexed copy of a Resolution of the Government of India in the Financial Department, No. 6307, dated 29th October 1874, relating to the cancellation of stamps under Section 30 of the Court Fees Act of 1870, is hereby circulated for the information and guidance of all Civil Courts subordinate to the High Court.

2. It will be seen that the present orders supersede those previously issued at the suggestion of the Government of India, in paragraph 2 of Circular Order No. 3, dated 17th January 1871, inasmuch as the cancellation of the stamp on such documents as copies, certificates, &c., by punching out the figure-head, is now to be effected not by the Court or office issuing the document, but by the Court or office receiving the same, and that the cancellation is accordingly effected not at the time the labels are affixed, but when the document is filed or acted upon.

By order of the High Court,

(Sd.) H. J. S. COTTON,
Officiating Registrar.

No. 6307, DATED FORT WILLIAM, THE 29TH OCTOBER 1874.

RESOLUTION—*By the Government of India, Financial Department.*

READ again—

Financial Order No. 3362, dated 30th November 1870, suggesting that it would be expedient to instruct the Courts to cause the stamp labels affixed to copies, certificates, and other documents issued by them, and liable to a fee under "the Court Fees Act, 1870" (Act No. VII of 1870), to be cancelled at the time they are affixed.

Read—

A letter from the Government of Bombay, No. 4194—179 R, dated 7th August 1874, stating that the course suggested in the above order is apparently at variance with the provisions of the law as at present enacted.

RESOLUTION.—On a re-perusal of the Court Fees Act, 1870, the Governor General in Council observes that the Act contains clear provisions as to cancellation which should be followed.

2. Under Section 30, the stamp can only be cancelled by the Court or office receiving the document to which the stamp has been

Digitized by Google

affixed. Such cancellation can be effected in one way only, namely, by punching out the figure-head, and this cannot be done twice. Consequently, the only time a stamp can be cancelled is when the document to which it is attached is filed or acted upon.

3. His Excellency in Council is accordingly pleased to decide that the cancellation of the stamps affixed to "true copies" of papers issued by a Court should be effected by the Court receiving such documents; officers when attesting "true copies" should, however, draw their pen across the stamp.

ORDERED, that a copy of the foregoing Resolution be forwarded to the Government of Bombay, with reference to that Government's letter No. 5194—179 R, dated 7th August 1874, to the other Local Governments and Administrations for information and guidance, in modification of Financial Order No. 3362, dated 30th November 1870, and to the Legislative Department for information.

E. F. HARRISON,
Offg. Secy. to the Govt. of India.

J. A. BOURDILLON,
Offg. Under-Secy. to the Govt. of India.

Draws attention to Rule of the High Court, Original Jurisdiction, regarding charge for serving processes of other Courts.

CIRCULAR ORDER No. 25.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, dated the 11th December 1874.

(English Department.)

(Civil.)

IN continuation of Circular Order No. 12, dated the 27th March 1874, the attention of all Civil Courts subordinate to the High Court is drawn to the Supplemental Rule, dated 22nd August 1874,* of which a copy is annexed, regarding fees and charges of the High Court in its Original Jurisdiction.

* *India Gazette* of 5th December 1874. Part II, page 482.

By order of the High Court,

(Sd.) H. J. S. COTTON,
Officiating Registrar.

HIGH COURT, ORIGINAL SIDE.

The following Rule made by the High Court of Judicature at Fort William in Bengal having received the sanction of the Governor General of India in Council, is now published.

By order,

(Sd.) C. T. DAVIS,
Officiating Registrar.

27th Novr. 1874.

It is ordered that the following items be inserted at the end of the fifth schedule to the Rules of the High Court which came into effect on the 9th of March 1874:—

[PROCESS OF OTHER COURTS.]

9. For serving or executing process specified in this schedule, as herein provided.

10. For serving every notice, summons to a witness, and other judicial process not specified in this schedule.

	European Bailiff. Rs.	Native Bailiff Re.
For each person served	2	1

R. COUCH.
F. B. KEMP.
LOUIS S. JACKSON.
J. B. PHEAR.
A. G. MACPHERSON.
W. MARKBY.
W. AINSLIE.
CHARLES PONTIFEX.
E. G. BIRCH.
G. G. MORRIS.
R. C. MITTER.
W. F. McDONELL.

Digitized by Google

Enquires whether the provisions of ss. 3 and 4 Regulation LVIII of 1795 are observed in each district.

CIRCULAR MEMO. No. 1.

Dated Calcutta, the 13th January 1875.

HIGH COURT.

English Department.

(*Civil.*)

To

THE JUDGE OF

THE Court desires to be informed whether the provisions of Sections 3 and 4 of Regulation LVIII of 1795 are observed in the district of

(Sd.) W. M. SOUTTAR,

Registrar.

Directs discontinuance of Quarterly Returns prescribed by Circular Order No. 12, dated 8th April 1872, but extends the instructions of that Circular Order to the Annual Statements.

CIRCULAR MEMO. No. 2.

Dated Calcutta, the 28th January 1875.

HIGH COURT.

English Department.

(*Civil.*)

REGARD being had to the Circulars specified on the margin, the Court is pleased to direct the discontinuance of the *Quarterly* Returns prescribed by Circular Order No. 12, dated 8th April 1872, the instructions contained in which will now apply to the preparation of the *Annual* Statements, under Circular Memorandum No. 14, dated 12th June 1874.

Circular Order dated 14th March 1874, No. 11.
Circular Memo. dated 12th June 1874, No. 14.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Registrar.

Prescribes rules for the guidance of Civil Court Ameens in carrying out local enquiries.

CIRCULAR ORDER No. 1.

Dated Calcutta, the 30th January 1875.

HIGH COURT.

English Department.

(*Civil.*)

THE Court are pleased to prescribe the following rules for the guidance of Civil Court Ameens in carrying out local enquiries involving the survey and measurement of lands by order of a Civil Court.

2. District Judges are requested to see that these instructions are exactly obeyed.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Registrar.

RULES.

1. All measurements must be made with chain and compass. The chain to be 30 feet in length.

2. The work must be plotted to scale, and the scale to be used by Civil Court Ameens is the brass Thakbust scale, 330 feet to the inch, or 16 inches to the mile.

3. This scale is made by dividing 4 inches into 11 equal parts, each of which will therefore be equal to a russee or beegah-side of 120 feet. Each of these parts sub-divided into 4 represents the measuring chain of 30 feet or 5 cottahs.

4. If the area of the land to be measured is too large to be conveniently shown on the 16-inch scale, the scale may be reduced to one-half. If the plot of land be very small, the scale can be increased to double, *i. e.*, 32 inches to the mile. For practical purposes the scale of 8 inches to the mile is the smallest scale Civil Court Ameens can safely use with such instruments as they have to employ. The scales enumerated bear due proportion to the professional survey scale and facilitate comparison with the professional survey maps.*

* In working from professional survey maps, it will be borne in mind that 20 Gunter's chains or 1,320 feet are generally, if not universally, represented by 1 inch. Each inch of a survey village map, therefore, is equal to 11 russees, and each Gunter's chain to 11 cottahs.

Digitized by Google

5. The starting point and every bearing and measurement taken must be recorded, as the measurement proceeds, in a Field Book. This Field Book must invariably be submitted with the map prepared, and in it any prominent land-marks adjacent to or on the line of measurement should be noticed.

6. In order to secure greater clearness and uniformity, it is further directed that all water, whether running or standing, is to be indicated in blue, the land in dispute to be shaded yellow, and all writing on the maps to be so made as to be read when the map is held with the North side uppermost.

Instructions to prevent the decision of cases ex-parte against a defendant without sufficient enquiry as to service of summons.

CIRCULAR ORDER No. 2.

HIGH COURT.

English Department.

(Civil.)

Dated Calcutta, the 30th January 1875.

THE returns to Circular Order No. 14, dated 13th June 1874, having shown that a large number of applications had been made to Civil Courts under Section 119, Civil Procedure Code, and that in many cases the application was successful, there is reason to apprehend that suits are occasionally decided *ex parte* against a defendant without sufficient enquiry as to service of the summons, and that such result may be in some measure due to a feeling on the part of the presiding officer that any hardship may be obviated by an application under Section 119. The Court are therefore pleased to direct particular attention to the subject, and to request that District Judges will have the goodness to satisfy themselves that the provisions of Section 111 are carried out according to their true intent, *i.e.*, that the Court in each case proceed to hear the case *ex parte* only on proof to its satisfaction that the summons has been duly served.

2. The Judges will require the Subordinate Judges and Moonsiffs to report each Quarter what number of applications have been made under the Section and how they have been disposed of; and this information will be embodied in the Annual Report, distinguishing between cases falling under Section 111 and those under 114.

3. It will be observed that the procedure of Section 119 is not applicable to suits dismissed under Section 110.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Registrar.

Work done by a Moonsiff vested with the powers of a Small Cause Court, under s. 29, Act VI of 1871, *to be shewn in a separately monthly return in form annexed.*

CIRCULAR MEMO. No. 3.

HIGH COURT.

English Department.

(Civil.)

Dated Calcutta, the 1st February 1875.

THE Court directs that for the future wherever a Moonsiff is vested with the powers of a Small Cause Court, under Section 29, Act VI of 1871, the work done by him in that capacity shall be shewn in a separate monthly return to be prepared in the annexed form which may be submitted to the District Judges in the vernacular or in English as each Moonsiff may find most convenient.

2. From the returns thus received, the District Judge will prepare one Statement to be submitted not later than the 15th of each month, exhibiting the work of each Moonsiff in his district who exercises those powers.

3. The cases exhibited in these returns will nevertheless continue for the present to be also included in the regular Quarterly Civil Statements under the usual heads, and will be likewise shewn in Judicial Statement No. 8, under the general head Paid Subdivisional Tribunals.

4. This rule will apply to the Subordinate Judge of Sylhet and to any other officer, of whatever rank or designation, who exercises Small Cause Court powers below those of a regular Small Cause Court.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Registrar.

Digitized by Google

Work done by Moonsiffs vested with Small Cause Court Jurisdiction under Section 29, Bengal Civil Court's Act, 1871, during

Courts.	Pending.	Received by institution and transfer.	Transferred.	Decided on trial.	And otherwise.	Remaining.	No. pending over six weeks.	Longest period of pendency of any case decided in the month.	Remarks.
Baboo Moonsiff of									

Circulates Home Department Resolution No. 440, *dated* 16*th November* 1874, *regarding transfer of convicts to Port Blair.*

CIRCULAR ORDER No. 1.

HIGH COURT.

English Department.

(Criminal.)

Dated Calcutta, the 5th February 1875.

The following Resolution of the Government of India in the Home Department, No. 440, dated the 16th November 1874, is forwarded herewith to all judicial authorities subordinate to the High Court for information and guidance.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Registrar.

Extract from the Proceedings of the Government of India in the Home Department (Port Blair), No. $\frac{8.}{440}$, *under date, Fort William, the* 16*th November* 1874.

READ—

Circular of the Home Department, Nos. 2911-18, dated 6th May 1863, drawing attention to the ample accommodation available for convicts at Port Blair, and suggesting the desirability of freer use being made by the Sessions Courts of the power vested in them under Section 59 of the Indian Penal Code, by which sentences of transportation for not less than seven years may be substituted for sentences of imprisonment.

Circular of the Home Department, Nos. 2085-86, dated the 18th August 1864, directing that transportation may be carried into effect only in cases of convicts sentenced to fourteen years and upwards.

Resolution of the Home Department, No. 2028, dated 28th December 1868, and orders cited therein, restricting transportation to life-sentences.

Resolution of the Home Department, dated 19th May 1874, regarding the deputation of the Hon'ble Sir H. Norman, K.C.B., to inspect the Penal Settlement at the Andamans.

Report by the Hon'ble Sir H. Norman, K.C.B., dated the 13th June 1874.

RESOLUTION.—The Governor General in Council has had under consideration the question of rescinding the Resolution of 1868 by which only life-convicts were to be transported to the Andamans. This Resolution has been maintained from that date, and the proportion of term to life-convicts has, in consequence, been very largely reduced. The Superintendent of the Settlement now very strongly urges the necessity of a proportion of term-convicts being kept up, on the ground that such convicts form an important element of safety to the Settlement. In this recommendation Sir H. Norman concurs. Upon this view thus supported, His Excellency in Council has decided to waive the considerations of general policy which restricted transportation to life-convicts and to permit term-convicts to be sent to the Settlement. The maximum proportion which term-convicts should bear to life-convicts will be precisely fixed hereafter, the admitted objects being to provide petty officers and to keep a certain number

Digitized by Google

of term-men among the working gangs. With these objects, General Stewart has been desired to report what number of term-convicts he needs at once, and to detail the instalments by which they should subsequently arrive. He has also been requested to mention any particular class or caste of convicts whose transportation may be desirable or useful to the Settlement, as also those, if any, who should not be sent.

2. The Superintendent has replied to this reference, and has urged that steps be at once taken to send term-convicts to Port Blair as soon as the transport season opens, because a larger amount of skilled labor than the Settlement can now supply is urgently required by him.

He states that there is immediate work for the classes specified in the margin, and if a large proportion of them can be obtained from the Madras jails it will be a gain, as convicts from that Presidency stand the climate of the Andamans better and are more tractable than natives of other Provinces.

Classes.	Number.
Carpenters	120
Bricklayers	120
Stone-masons	20
Sawyers	50
Stone-cutters	15
Brass-makers	5
Iron-moulders and casters .	5
Blacksmiths	50
Shoeingsmiths	3
Brick-moulders	5
Surveyors	4
Draftsmen	3
Rattan-workers	6
Engine-drivers	3
English and Vernacular writers	15
Tile-makers..	3
Potters	3
Total ..	430

3. As it is not, however, expedient, in the interests of discipline, to permit educated men to work as clerks until they have by good conduct in imprisonment become entitled to such light employment, General Stewart recommends that convicts who have been for some years at hard labour in India should alone be selected for employment as clerks at Port Blair. This recommendation is approved by the Government of India.

4. He also requires a considerable number of sweepers for conservancy purposes, and in view to secure an ample supply of this class he suggests that the rules regarding age and physique need not be strictly enforced, provided that those selected for transportation are fit for sweeper's work. For the rest he considers that if it be possible to supply the requirements of the Settlement without having recourse to dacoits and habitual thieves, it would be desirable, as convicts of these classes rarely settle down to work or give up the practices of their early training in crime; moreover, dacoits are the most persistent concocters of schemes for escape, and thus help to unsettle the minds of their comrades. With these exceptions, the Superintendent does not think it would be expedient to place any restriction on the transportation of term-prisoners who fulfil the usual conditions required of transmarine convicts. These recommendations are also approved.

5. It has been already observed that the deportation of term-convicts is now sanctioned in deference to authoritative opinions affirming the necessity for it. In sanctioning this important change of system, His Excellency in Council observes that the substantial reasons which have hitherto caused a different policy to be affirmed must be well known; they concern mainly the difficulty of adjusting the penal system to the two different classes of convicts for a term and convicts for life, so that it shall neither be too indulgent for the former class nor too rigorously severe for the latter. There are also other difficulties touching the status and general treatment of the convict population which are greatly enhanced by mixing together those who are to return to civil society and those who are not to return. General Stewart believes, however, that all these difficulties can be surmounted; and His Excellency in Council agrees to the experiment on the understanding that one essential condition of success is, that a sentence of transportation for a term must be carried out with due rigour. There has hitherto been a general impression that the deterrent effects of transportation have been considerably diminished by reports of time-expired convicts on their return to the mainland; and if this impression be well founded, it indicates the necessity of guarding against a serious drawback to the advantages of the mixed system which has now been again admitted.

6. Local Governments and Administrations are therefore requested to inform the judicial authorities of the purport of this Resolution, and to report how many convicts of the required description can be contributed from each province. The men selected should have a minimum term of seven years to serve. As one month of the transportation season has already elapsed, this information should be supplied as early as possible.

7. In future, whenever practicable, term-convicts of not less than ten years' sentence should be sent to Port Blair in the proportion of one to every three life-convicts.

Order.—Ordered, that a copy of this Resolution be forwarded to all local Govern-

Digitized by Google

ments and Administrations for information and guidance, and to the Superintendent of the Andamans.

(True extract.)

(Sd.) A. HOWELL,

Offg. Secy. to the Govt. of India.

Draws attention to Circular Order No. 5, dated 5th July 1865, regarding the maintenance of a "Register of Criminals convicted of heinous offences."

CIRCULAR MEMO. No. 1.

Dated Calcutta, the 1st March 1875.

HIGH COURT.

English Department.

(Criminal.)

At the instance of His Honor the Lieutenant-Governor,* the Court is pleased to call the attention of District Magistrates to the instructions contained in Circular Order No. 5, dated the 5th July 1865, regarding the maintenance of a "Register of Criminals convicted of heinous offences," with a view to a strict observance of those instructions in future, there being reason to believe that they have not been uniformly observed, and that injury to the public service has arisen from such omission.

* *Vide* Government letter No. 470, dated the 2nd February 1875.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Registrar.

Circulates copy of letter to Additional Sessions Judge of 24-Pergunnahs stating that it is not necessary that the directions to the Jury should be reduced to writing, but that the statement or "heads of charge" placed upon record should represent with absolute accuracy the substance of the charge.

No. 334.

FROM

W. M. SOUTTAR, ESQ.,

Registrar of the High Court of Judicature at Fort William in Bengal,

To

THE OFFICIATING ADDITIONAL SESSIONS JUDGE OF 24-PERGUNNAHS.

Dated Calcutta, the 4th March 1875.

HIGH COURT.

English Department.

(Criminal.)

SIR,—I am directed to acknowledge the receipt of your letter No. 24, dated 19th February 1875, in which you enquire whether the direction to the jury should be reduced to writing before delivery, or written out afterwards from memory.

2. I am to inform you in reply, that it is not necessary that it should be reduced to writing before delivery; but it is essential that the "statement" (Section 255, Act X of 1872) or "heads of charge" (Section 464) placed upon the record, should represent with absolute accuracy the substance of the

Digitized by Google

charge and be such as to enable this Court, in the event of an appeal, to see distinctly whether the case was fairly and properly placed before the jury.

I have, &c.,

(Sd.) W. M. SOUTTAR,
Registrar.

CIRCULAR MEMO. No. 2.

HIGH COURT.

English Department.

(Criminal.)

Dated Calcutta, the 4th March 1875.

Forwarded to all Sessions Judges for information and guidance.

By order of the High Court,

(Sd.) W. M. SOUTTAR,
Registrar.

Circulates letter to Judge of Bhaugulpore informing him that a ryot has a right in a district like his to deposit in Court such portion of his produce as represents the rent admittedly due to the zemindar.

No. 499.

FROM

W. M. SOUTTAR, ESQ.,

Registrar of the High Court of Judicature at Fort William in Bengal,

To

THE JUDGE OF BHAUGULPORE.

HIGH COURT.

English Department.

(Civil.)

Dated Calcutta, the 5th March 1875.

SIR,—I am directed to acknowledge the receipt of your letter No. 22, dated the 19th February 1875, in which you st determination of the Court, whether, in a district like where the system of paying r prevails, a ryot has the right Court under Section 46, Act of 1869, such portion of the produce as represents the ren due to the zemindar.

2. In reply, I am to state th considers it quite consistent w that such deposits should be approves the instructions given b Moonsiff in the case reported in

I have, &c

(Sd.) W. M. So

CIRCULAR MEMO. N

HIGH COURT.

English Department.

(Civil.)

Dated Calcutta, the 5th Mar

Forwarded to District Judges f tion and guidance.

By order of the High Co

(Sd.) W. M. Sou

R

Digitized by Google

Fixes the limits of the pay of Naib Nazirs and the increments in the pay of Nazirs.

CIRCULAR MEMO. No. 5.

Dated Calcutta, the 8th April 1875.

HIGH COURT.

(English Department.)

(Civil.)

IN continuation of Circular Order No. 13, dated 12th May 1874 (*vide* paragraph 16), and with reference to Articles 1 and 2, Rule I of the Rules* framed under Clause 3, Section 20 of the Court Fees Act, 1870, the Court is pleased to issue for the guidance of the Civil Courts subject to its control, the following Order of the Government of India in the Financial Department.

* *Vide Calcutta Gazette* of 25th February 1874.

By order of the High Court,

(Sd.) W. M. SOUTTAR,
Registrar.

No. 1456.

To

THE ACCOUNTANT-GENERAL, BENGAL.

(Financial Department.)

SIR,—In reply to your letter No. $\frac{\text{T. M.}}{189}$, dated 7th November 1874, I am directed to state that the pay of the Naib Nazirs attached to the Courts of the Subordinate Judges in Bengal, will be fixed within the limits of Rs. 25 and 35 per month by the Government of Bengal on the report of the District Judges.

2. As to the rate of increment to the progressive pay of Nazirs of the Civil Courts in Bengal, I am to state that the Governor General in Council is pleased to sanction the grant to these Nazirs of annual increments at one-tenth of the difference between the minimum and maximum of their pay.

I have the honor to be, &c.,

(Sd.) R. H. HOLLINGBERY,
Asst. Secy. to the Govt. of India.

FORT WILLIAM,
The 8th March 1875.

Quarterly Returns of Peons' Tullabana to be submitted by Judges of Small Cause Courts through District Judges.

CIRCULAR MEMO. No. 6.

Dated Calcutta, the 8th April 1875.

HIGH COURT.

(English Department.)

(Civil.)

THE Court is pleased to direct that for the future, the Quarterly Returns of receipts and disbursements on account of Peons' Tullabana, prescribed in paragraph 8 of Circular Order No. 10A, dated 26th April 1864, shall be submitted by Judges of Small Cause Courts through the District Judge, under whom these Courts are placed by Section 22 of the Court Fees Act of 1870, for the purposes of that Section.

By order of the High Court,

(Sd.) W. M. SOUTTAR,
Registrar.

Do Moonsiffs with Small Cause Court powers use Summons Books and Registers?

CIRCULAR MEMO. No. 7.

Dated Calcutta, the 16th April 1875.

HIGH COURT.

(English Department.)

(Civil.)

DISTRICT Judges are requested to report whether Moonsiffs vested, under Section 29 of Act VI of 1871, with the jurisdiction of a Judge of a Court of Small Causes, have and use the Summons Book and Register in use in regular Small Cause Courts.

By order of the High Court,

(Sd.) W. M. SOUTTAR,
Registrar.

Digitized by Google

Inquires how Circular Order No. 21 of 1873 has worked.

CIRCULAR MEMO. No. 8.

Dated Calcutta, the 28th April 1875.

HIGH COURT.

(English Department.)

(Civil.)

ALL District Judges and Judicial Commissioners are requested to report, for the information of the Court, how the rules laid down in Circular Order No. 21, dated 18th August 1873, have worked, both as regards the obtaining of better sales and in the way of preventing abuses in respect more particularly of the smaller holdings sold in execution; and whether, in such cases, complaint has been made.

By order of the High Court,

(Sd.) W. M. SOUTTAR,
Registrar.

Calls for a report from District Judges and Judicial Commissioners, as to how the Court Fee Rules have worked.

CIRCULAR ORDER No. 3.

Dated Calcutta, the 8th May 1875.

HIGH COURT.

(English Department).

(Civil.)

MORE than a year having now elapsed since the promulgation of the rules made under the Court Fees Act, and the Court being desirous of judging how the rules have worked, and in what respects they need improvement or expansion, all District Judges and Judicial Commissioners under the Court's authority are requested to submit, within the first week in July next, a careful report on the subject.

2. The Court desire to be informed as to the operation of the rules—

1*st.*—With reference to the interests of suitors.

2*nd.*—As to official convenience.

3*rd.*—From the financial point of view.

3. Under the first of these heads it should be shown whether any injurious effect has been produced, or complaint occasioned, by alterations in the amount of fees as compared with the practice superseded by the rules; whether a resort to process particular kind has been promoted couraged by the fees imposed, with reference to the charges, some of them imposed on processes requisite in ex of decree.

4. Under the second head, it sh stated how far the rules have smoothly, regarded merely as a co office regulations; whether they ha sented any real difficulties to fairly gent officers; whether they have been to admit of easy check and contr superior authority; whether the fe considered as bearing a due proport the importance or difficulty of the s to which they severally apply, and w they have in any instance a tende throw excessive labor on officers w not paid out of the fee fund or with re to it.

5. As bearing upon this inquir Court refer to the very general co that improper advantage is taken uniform fee of Rs. 2 or Re. 1 on summons, without reference to the of persons named therein, and that wi in unreasonable numbers are cited recklessly or with a view to some gri being founded on the failure of such w es to appear at the trial.

6. Upon the third head of inqui Court desire to be informed, as fully sible, of the income derived from t and the expenditure to be set against While on the one hand the Court h considered that these fees ought to any important sense, a source of reve the other it is clear that the Gove ought to be protected against loss, n on the whole, but also in any given di

7. It is material to know whet salaries and remunerations fixed peons and the superior officers emplo the service or execution of process been found adequate in both the high the lower grades for the purpose of ing and retaining in the service m qualified for the duties which they ar on to perform, and whether the circum of particular districts demand an in or permit a reduction in the salaries a ed, which, as they stand, are applic all districts.

8. The Court desire particularly informed how far it has been practic appoint no process-server who cannot and write, how many old officers kind, *i.e.* unable to read and write,

Digitized by Google

been retained and for what reason. And opinions are invited as to a suggestion which has been made that, on the establishment of every superior Court, there should be a limited number of peons of a superior class and bearing a different name for the performance of the more responsible duties devolving on these men, such as the attachment of property and arrest of judgment-debtors in large suits, and the like.

9. The Court expect that District Judges will treat the subject with the care which its importance demands, and will render valuable assistance in preparing revised rules for acceptance by the Government.

10. It will be convenient if, in making their reports, the District Judges follow strictly the order here indicated.

By order of the High Court,
(Sd.) W. M. SOUTTAR,
Registrar.

Scale of costs to be ordinarily allowed to the successful party in Appeals to the High Court in its Appellate Jurisdiction, to take effect from the 1st of June 1875.

SPECIAL APPEALS.

Not exceeding Rs. 200—
Drawing grounds of appeal Rs. 4
Hearing fee ... „ 16
Exceeding Rs. 200 and not exceeding Rs. 1,000—
Drawing grounds of appeal Rs. 8
Hearing fee ... „ 32
Exceeding Rs. 1,000 and not exceeding Rs. 5,000—
Drawing grounds of appeal Rs. 12
Hearing fee ... „ 48

REGULAR APPEALS.

Not exceeding Rs. 5,000—
To be fixed by the Court.
Exceeding Rs. 5,000 and not exceeding Rs. 10,000—
Drawing grounds of appeal Rs. 50
Hearing fee ... „ 300
Exceeding Rs. 10,000 and not exceeding Rs. 20,000—
Drawing grounds of appeal Rs. 50
Hearing fee ... „ 500
Exceeding Rs. 20,000 and not exceeding Rs. 50,000—
Drawing grounds of appeal Rs. 100
Hearing fee ... „ 750
Exceeding Rs. 50,000—
Drawing grounds of appeal „ 100
Hearing fee ... „ 1,000

MISCELLANEOUS APPEALS (Regular or Special).

Not exceeding Rs. 5,000—
Same as Special Appeals.
Exceeding Rs. 5,000—
Drawing grounds of appeal Rs. 16
Hearing fee ... „ 64

REVIEWS, (Where Notice is given and Opposite Party appears.)

The same costs as were allowed upon the hearing in Special and Miscellaneous Appeals.

In Regular Appeals, the costs to be fixed by the Court.

APPEALS UNDER SECTION XV OF LETTERS PATENT.

The same costs as were allowed at the previous hearing.

APPLICATIONS (Where Notice is given and Opposite Party appears).

To be fixed by the Judge or Judges who hear the application.

GENERAL RULES.

When there are several parties to an appeal, review, or application, one set of costs will be awarded generally, unless the Court, upon the application of the parties, shall otherwise order.

Unless there is a cross-appeal filed, the hearing fee alone will be allowed to the respondent.

By Order,
W. M. SOUTTAR,
Registrar.

The 22nd May, 1875.

Digitized by Google

Digitized by Google

REVENUE CIRCULARS.

DECEMBER 1874.

HON'BLE V. H. SCHALCH, C.S.I.

Prescribes Rules for the classification, &c., of English Correspondence in Collectors' Offices.

No. 1.

THE practice of breaking up the Files of correspondence on one subject, and placing each letter in the record room in a chronological bundle belonging to the month in which it was received or issued, has been universally condemned on the ground of its inconvenience, and of the time which is wasted in so breaking up the original Files, and in forming them again (if they happen to be required for reference), by collecting the scattered letters from the monthly bundles.

2. Experience has shewn that there is no necessity for ever separating the letters which form a correspondence on one subject.

3. Such a system as is described in the annexed rules has been introduced with complete success into the largest offices. A similar system has been in operation for several years in the offices of the Commissioner, and of all the Collectors of one division, and their testimony is unanimous in favor of its convenience and smooth working.

4. The Member in charge desires that all revenue officers will adopt the classification and arrangement prescribed in the annexed rules, from the beginning of 1875, or at latest from the 1st April 1875.

5. It is open to each officer to make any modification in the rules which he may consider to be adapted to his office; but the general principle must be adhered to, that letters forming correspondence on one subject shall always be kept together, and never scattered about into monthly bundles.

6. The Superintendent of Stationery has been directed to provide each Commissioner and Collector, at once, with a few forms of Registers 1, 2, 3, and with a supply of printed docket forms. Further supplies may be obtained on indent as usual.

7. These rules should be substituted for those contained in Section I, Chapter XIII of the Board's Rules. The three Registers I, II, and III, prescribed in the annexed rules, will take the place of Nos. 85, 86, 86A, and 87 (pp. 226, 227,) and those Registers are accordingly cancelled.

Rules for the Classification and Registration of English Correspondence in Collectors' Offices.

1. The system detailed in the following rules provides for classifying, registering, and keeping the correspondence of an office,

First, by departments;

Secondly, within each department, by "Collections" of papers; each Collection having its consecutive number and distinctive title;

Thirdly, within each "Collection" by "Files," each File having its consecutive number within the Collection, and its distinctive "subject."

Files.

2. A single File consists of every letter received, and every draft of a letter or memorandum issued in the course of a consecutive correspondence on one subject, each paper being folded and placed in chronological order, *i.e.*, the first letter issued or received at the bottom, the next above it, and so on, the letter of latest date being at the top. Each letter will have assigned to it a consecutive number within the file to which it belongs, which may be styled the serial number. With each letter or draft should be kept any office notes which passed with regard to it; these are technically called "keepwiths," and do not bear separate serial numbers as part of the correspondence.

Collections.

3. A "Collection" is an aggregate of Files, of which the subjects fall under

Digitized by Google

some general classification, and which are tied up together and kept together on the racks for convenience sake, and for economy of space. For instance, the English correspondence regarding the settlement of one ordinary estate will constitute a File; a number of such Files will be kept together in one Collection, of which the title would be "Settlements;" so also there may be a Collection, entitled "Wards' Estates;" another "Embankments," and so on; each Collection consisting of so many separate Files, each File containing correspondence relating to one ward's estate, or to some one distinct question relating to one ward's estate or to one embankment. It will be found convenient in starting this system, that the Collector should, from his general knowledge of the business of the office, sketch out a list of Collection titles which suggest themselves to him under each department; but the number of Collections and their titles must not be rigidly fixed; they may be freely added to in the course of the year as found convenient; for instance, although one Collection would be entitled "Wards' Estates" within which all Files regarding wards' estates would ordinarily fall, yet in any district in which one or more very large estates entailing much correspondence happened to be under the Court, it would be convenient to have a separate Collection for each of such estates, within which every correspondence on a different question would form a separate File.

4. The correspondence of a Collector's office may be divided into the following Departments, and any others which may be found convenient:—

Departments.

I. General Department.
II. Account and Treasury Department.
III. Excise Department.

5. The smooth working of the system will depend much on the correct and careful registration of the letters received and issued. Three Registers will be kept up, *viz.*:—

Registers.

I. Register of Letters Received.
II. Register of Letters Issued.
III. Index Register of Files.

The forms of these Registers are annexed.

6. To facilitate the finding of any required letter in the Register of Letters Received or Issued, each of these Registers should be divided into as many parts as there are Departments, each Department having its own series of numbers.

7. In large offices, it is also found convenient to subdivide the Register of each Department, so that each of the officers with whom much correspondence is carried on, shall have his own series of numbers, but this will not generally be necessary.

8. The Index Register No. III will also be divided into Departments, and each Department into "Collections;" a whole page should be assigned to each Collection so as to leave ample room to enter each letter as it is received or issued, under the Collection to which it belongs. The arrangement of the records on the racks (as explained below in Rules 18 *et seq*), will be in Collections exactly corresponding with the Collection titles entered in this Register. Column 2 of the Register will shew the number of the File within which the letter is placed. It is explained in Rule 1 that the Files contained in each Collection will bear a separate series of consecutive numbers.

Index Register No. III.

9. During the year, the different parts or departments into which each Register is divided, will be kept in the shape of so many pamphlets or sheets of paper, temporarily secured between paste-boards. But at the close of the year (each series of numbers having terminated), all the portions of each Register will be bound up together strongly, so that the whole of each Register will form one volume.

Treatment of fresh letters received, and the replies issued.

10A. As soon as a letter is received in the office, the date of receipt should be marked on it, as well as the Department and Collection (see Rule D below), under which it shall be classed. These should be marked on it in pencil by the head clerk himself, as a guide for the docketer. If the letter falls under no Collection which has already been formed, the head clerk will have to assign to it a "Collection title." The letter will then be docketed as in the annexed specimen A of a docket, and entered in the "Register of Letters Received," columns 1 to 8 being at once filled in, but column 9 being left blank till the Collector disposes of the letter, any necessary entry will also be made in column 7 of Register II.

Receipt of letters.

B. If the letter be the commencement of a new correspondence, and not in continuation of an existing File, it will form the nucleus of a new File, to which will be

Digitized by Google

assigned the next consecutive File number within the Collection to which it belongs, and also the File "subject." An entry of the File will then at once be made in the Index Register No. III.

C. If the letter is in continuation of a a File which has already been formed, the clerk will get out the File to which it belongs, will assign to the fresh letter the next consecutive serial number of the series of letters of that File, and will place the fresh letter on the top of the File. He will also get out any other Files which are required for elucidation of the matter. The greatest care should be taken by all through whose hands the papers pass at any stage, not to mix up the letters belonging to different Files; each File should always be tied up separately.

D. The clerk will then submit the case so prepared to the Collector direct or to head clerk,* as the practice of the office may be.

* Where the Collector does not himself open his covers, it should be made a strict rule that no fresh letter is on any pretext to be allowed to remain more than 48 hours in the office without being brought to his notice. If there is any difficulty in finding references, they can be put up after the Collector has seen the letter.

E. The Collector will either draft a reply or pass such order as may be required. If the order be written on a separate piece of paper, the piece should be of a shape uniform with that into which the letters are folded, and it should be placed on the top of the File. The clerk should be careful to keep it always with the File and annexed to the letter on which the order is passed.

Issue of letters.

11. When a draft has been written or approved by the Collector, the clerk will make the fair copy for issue, and submit it for signature, after which he will—

I. Enter the issuing letter in his Register No. II. of letters issued, filling in columns 1 to 6.

II. Docket the draft as in the annexed specimen B, and add the Register number and the date both to the draft which is to remain in the Office File and to the fair copy which is to issue.

III. Despatch the fair copy.

IV. Write the date of issue on the draft, and place it in its proper place at the top of the File.

V. Fill up column 9 (date of reply) in the Register of Letters *Received*, opposite the letter to which the out-going letter relates, if any.

VI. Assign to the draft its "serial number," or consecutive number in the series of letters within the File.

(*a.*) If the draft belongs to no previously constituted File, but opens a new correspondence, it will form the nucleus (*i.e.*, No. 1) of a new File, to which the next consecutive File number within its Collection should be assigned, and the entry of the File should then be made at once in Index Register No. III, under the Collection to which it belongs.

(*b.*) If the draft is in continuation of a previously constituted File, it will only be necessary to assign to it its serial number within the File. If the letter be drafted so that the address, number, and date, &c., are uppermost when it is in the File, no docket will be necessary, otherwise the draft should be docketed before it is replaced in the File.

VII. The above operations having been completed, the File, being no longer required, should be returned to its proper place in the Collection to which it belongs.

12. Many letters received in, or issuing from, a Collector's office are of very transient interest, or are such that the correspondence begins and ends with the one letter, and its reply. The classification of such letters, and the sorting of them into Files and Collections, will not be worth the trouble it would entail, nor is it necessary. In each Department should be opened a "Miscellaneous Collection," within which all such letters may be placed chronologically without reference to subjects.

Arrangement of Files and Collections.

Current correspondence.

13. The correspondence of one, two or three years (as found convenient) may be treated as current correspondence and kept in shelves in the clerk's room for ready reference. At the close of each year, the correspondence of the year which passes out of the category of current correspondence will be transferred to the record room as described below in Rules 18 *et seq.*

14. The current correspondence shelves should be divided into compartments, of which a convenient number should be assigned to each Department into which the correspondence of the office is divided, and should be labelled accordingly.

15. In every File should be kept a list of the letters which constitute it, an addition being made to the list as each letter is received or issued.

16. Before the correspondence of any year is transferred from the current shelves

Digitized by Google

to the record room, every Collection will be opened and the Files within it examined. Any File of which the correspondence is not completed will be taken out of the Collection and restored to the current shelves; the separation of such papers from the Collection of which they originally formed a part will be final. For the purpose of tracing them in future, they will be accounted for as described in Rule 18 below, on the record Registers of the year to which they originally belonged—say, 1872. The papers of such a pending File (having been separated at the beginning of 1875 from the papers of the year 1872, which are being transferred to the record room) will remain on the current shelves until the next letter on the subject of the File is received or issued. This fresh letter (the first on the subject received or issued in 1875) will not be numbered and dealt with as a continuation of the File of 1872, which has already been formed; but it will be treated as the nucleus (or No. 1) of a new File, which will bear its consecutive File number within its appropriate Collection of the year 1875. The papers of the pending File of 1872 will simply be placed below this fresh letter as "back papers," and will be so kept in the proper place on the current shelves under the year 1875.

17. Every Collection should be kept in its proper place in the shelves, and every File in its proper place within the Collection, except when it is in actual use. Clerks should be strictly prohibited from keeping Files on their desks, except when they are actually in use. As soon as the issuing letter has been issued, the File should be returned to its Collection on the racks.

Arrangement of Old Correspondence.

18. As mentioned in Rule 13, as soon as possible after the close of each year, the correspondence of the year which has passed out of the category of "current correspondence," will be transferred to the record room as old records. Before this is done, every Collection will be opened, the papers examined, and the pending Files taken out and restored to the current shelves (*vide* Rule 16). This separation will be final. In the Index Register of the year under transfer, against the Collection from which the papers have been so removed, it will be carefully noted in each case that "the papers of File No. 34 have been transferred to Collection No. II of the subsequent year 1875," or as the case may be. Eventually, when the papers are placed on the old record racks, column 4 of Index Register No III will be filled up.

19. The pending Files having thus been separated from the Collections of the year under transfer, the remaining papers of the year will be removed from the current correspondence rack, and placed on the old record racks as described in the following rules:—

20. All the records deposited as old records in one year will be kept together on the old record racks. The records of each year will be divided into Departments, and the Departments sub-divided into Collections, within which the Files will be arranged numerically,—*i.e.*, according to the number which they bear in Index Register No. III. At the top of each Collection should be placed a list shewing the numbers and subjects of the Files of which the Collection, as received from the current Department for deposit, consists. The list will show which of the Files have been retained in the current Department under the following rule.

21. Before they are placed on the record racks, the Files belonging to each Collection will be tied together into "packets," and placed between boards, or strong paste-board. When the papers of one Collection are numerous, it will be necessary to make them into two or more "packets" (each packet being secured between boards). Similarly, two or more Collections can be placed in one packet, if they consist of few papers. On the board which is placed at the top of each packet, will be written the names of the Collections which it contains, thus—

Year 1872.

Department—General.

Packet I.

Collections I, Wards; VI, Butwarrahs.

22. The packets so formed will be arranged by departments on the record racks, and the year should be labelled on the part of the rack which is assigned to the records which are deposited at its close.

23. As each bundle is placed on racks, column 4 of the Index Register No. III will be filled up.

24. For Files of the year under transfer which have been restored to the current correspondence racks, under Rules 13 and 18 above, column 3 of the Index Register will remain blank until they are deposited on the old record racks at the end of the next or some future year.

Digitized by Google

1875.

I.—Register of Letters Received.

Department—General.

Consecutive No. in this Register.	Date of Receipt.	From whom received.	No. of the Letter.	Date.	Subject.	Where the Letter is placed.		No. and Date of Reply or Abstract of other mode of disposal.	Remarks.
						No. and Title of the Collection.	No. of the File within the Collection.		
1	2	3	4	5	6	7	8	9	10
1	1st January	Commissioner.	975	28th Dec. 1874	Confirms the settlement of Jamalpore.	I. Settlement.	1	Vernacular proceedings ordered, 1st January.	*Explanation of specimen entries.*
2	Ditto ..	Ditto ..	984	30th ditto ..	Confirms Butwarrah of Seebpore.	II. Butwarrah.	1	Ditto.	
3	2nd Jan. ..	Board ..	11567	14th ditto ..	Asks explanation of discrepancy in Statement No. X.	III. Miscellaneous.	1	Reply dated 4th January 1875.	
4	Ditto ..	Commissioner.	2	1st Jan. 1875	Returns settlement of Jaipore for revision.	I. Settlement.	2	Reply 30th June 1875.	
5	3rd Jan. ..	Ditto ..	10	2nd ditto ..	Communicates Board's sanction to expenditure of Rs. 5 for arranging records.	III. Miscellaneous.	2	No reply.	
6	4th ditto ..	Ditto ..	12	Ditto ..	Directs acquisition of land for Post Office.	IV. Acquisition of Land.	1	Declaration submitted 20th January.	
7	Ditto ..	Ditto ..	15	Ditto ..	Asks opinion on draft of Butwarrah law.	II. Butwarrah.	3	Reply 28th February.	This will be File 3 and not File 2 of Collection II., Butwarrahs, because File 2 has already been assigned at an earlier date to the Butwarrah of Kalianpore, *vide* entry No. 1 of the Register of Letters Issued.

N.B.—This Register will be divided into parts corresponding with the number of Departments into which the correspondence of the office is classified. Each part will be kept separate during the year, in the shape of a pamphlet. At the end of the year all the parts will be strongly bound up together.

Digitized by Google

1875.

II.—Register of Letters Issued.

Department—General.

Consecutive No. in this Register.	Date.	To whom addressed.	Subject.	Where the Draft is placed.		No. and Date of Reply received.	Remarks.
				No. and Title of the Collection.	No. of the File within Collection.		
1	2	3	4	5	6	7	8
							Explanation of entries.
1	2nd January ..	Commissioner.	Reports for sanction, Butwarrah of Kalianpore.	II. Butwarrah.	2	25th February 1835.	File No. 1 of this Collection II, Butwarrahs, has already been assigned to the Butwarrah of Seebpore. See entry No. 2 of Register of Letters Received.
2	Ditto ..	Ditto ..	Reports embezzlement of stamps ..	V. Stamps.	1	15th January.	
3	4th ditto ..	Board ..	Explains discrepancy in Statement X. ..	III. Miscellaneous.	1	None required.	Placed on same File as letter No 3 of "Register of Letters Received," to which it is a reply.
4	5th ditto ..	Commissioner.	Reports death of Sibnarain Roy, and recommends that the estate of his minor son, Joynarain, aged 8 years, be taken under Court of Wards.	VI. Wards.	1	28th January.	

N.B.—See the N.B. on Register No. 1, which applies also to this Register.

Digitized by Google

1875.

III.—Index Register of English Correspondence.

Department—General.

No. and Title of Collection.	No. of File within Collection.	File Subject.	Year under which the File is deposited in the record room and Collection No.	Remarks.
1	2	3	4	5
I.—Settlements.	1	Settlement of Jamalpore ..	I. of 1875.	
	2	,, Jaipore ..	III. of 1876.	
		Space of half a page at least to be left.		
II.—Butwarrah.	1	Butwarrah of Seebpore ..	II. of 1875.	
	2	,, of Kalampore ..	II. of 1875.	
	3	Draft of new Butwarrah law ..	Ditto.	
		Space of half a page at least to be left.		
III.—Miscellaneous.	1	Miscellaneous	III. of 1875.	The Miscellaneous Collection, as explained in Rule 12, will contain only Files in which letters on different subjects are arranged chronologically.
		Space of half a page at least to be left.		
IV.—Acquisition of Land.	1	For Post Office	IV. of 1875.	
		Space of half a page at least to be left.		
V.—Stamps.	1	Embezzlement of Stamps ..	VIII. of 1876.	
		Space of half a page at least to be left.		
VI.—Wards.	1	Estate of Joynarain ..	III. of 1885.	This File cannot be placed in the record room until the minor Joynarain comes of age in 1885, and the estate passes from the management of the Court of Wards. Column 4 will therefore remain blank till the year 1885.

N.B.—In this Register not more than two Collections will be opened on each page, so as to leave ample room for entering any number of Files (as they are formed) under the Collection head to which each belongs.

Every correspondence which begins within the year will be entered at once on this Register as soon as it is begun; when, on the transfer of the records of any year to the old record room, a correspondence is detained among the current records because it is still pending, such correspondence will also be entered in the Register for the new year under a new number under Rule 18. Column 4 of this Register will remain blank until the papers of the File are deposited in the old record room. The Register will be divided into parts corresponding with the departments into which the correspondence of the office is classified.

Digitized by Google

A

[*Specimen of Docket Cover for letters received.*]

1875.

—

DEPT. GENERAL REV.

FROM

COMMISSIONER

No. 153. Dated 1st October.

Enclosures 2. Received 2nd ditto.

COLLECTION III: WARDS.

Order Issued, No. 200, dated October 4th.

Space for Collector's order, if brief, as "Draft reply that the Minor will reach his majority on 1st February 1878."

File No. 2.

Subject of File, RELEASE OF JAMBOONEE ESTATE.

Space for the abstract of the letter, as

"ENQUIRES when the Jamboonee Estate will be released."

B

[*Specimen of Docket Cover for letters issued.*]

1875.

—

GENERAL DEPARTMENT.

To

COMMISSIONER

No. 200 Dated October 4th.

COLLECTION III: WARDS.

Reply received, October 10th.

File No. 3.

Subject of File, RELEASE OF JAMBOONEE ESTATE.

Space for abstract of letter, as

THE Estate will be released when the Minor reaches his majority on 1st February 1878.

Digitized by Google

Substitutes new Rules regarding estimates for local improvements for those in cls. 1 to 10, s. 3, Ch. VII, p. 150 of the Board's Rules.

No. 2.

THE following rules have been substituted for those contained in clauses 3 to 10, Section III, Chapter VII, p. 150 of the Board's Rules. Estimates for 1875-76 should be at once submitted on the principles herein laid down—

3. The following instructions are issued for the preparation of estimates in connection with the assignment for local improvements of a portion of the land revenue derived from Government estates and temporarily-settled estates, which is the subject of the Board's Circular, No. 36A, dated 17th January 1874 :—

1*st.* — *Imperial Estimates.* — The first thing will be to enter the amount of the assignment as a disbursement in the Imperial Budget. As the Accountant-General cannot check the amount, the Board will supply him with the figures each year in detail of districts.

2*nd.*—To enable the Board to do this, Commissioners must submit to the Board, at the same time as they submit the Imperial Budget estimates of each district, *i.e.*, not later than the 20th of August, an estimate of the amount which the assignment will yield in each district during the year. The estimate must be supported by a statement in the annexed Form A showing—

I.—The estimated net revenue from all Government estates with number of estates.

II.—The estimated net revenue from those of the temporarily settled estates belonging to private individuals, out of which an assignment may be taken under the orders, *i.e.*, all estates of this class which have been brought under re-settlement since the orders making the assignment were passed by Government; and all which may be coming under re-settlement in the year to which the estimates refer, with the number of estates.

III.—Total of I and II.

IV.—Assignment calculated at 3* per cent. on the amount shewn under column 4.

* Except in the Bhootan Dooars, where the calculation will be made at the rate of one anna for every rupee which reaches the treasury, or 1-17th of the net revenue.

3*rd.*—The Board will certify this total to the Accountant-General as the amount to be entered in the Imperial Budget estimates as a disbursement under the head "Land Revenue." "*Assigment to provincial funds (Local) or improvement of Government and temporarily-settled estates.*"

4*th.*—*Provincial Estimates.*—The amount above certified will be taken by the Accountant-General as a receipt in the local funds portion of the provincial estimates under the head "Assignment from Imperial Funds for improvement of Government and temporarily-settled estates." This will be a distinct fund, and for the disbursement side of the account, the Board will supply the budget figures to the Accountant-General.

5*th.*—To enable the Board to supply these figures, each Commissioner will send up estimates for his division in the annexed Forms B or C, each district being entered in B or in C according to whether the road cess will or will not be levied in it during the year of estimate. These statements will be due to the Board on the same date as the Provincial Estimates are due to the Accountant-General, *viz.*, the 15th of September. The Board will check these estimates as to the proportion assigned to each of the objects, and for this purpose the Commissioner's estimates must be accompanied by remarks explanatory of any deviation from the proportions in which the Government have suggested that the assignment should be applied to different objects. When checked, the estimates will be passed on to the Accountant-General for incorporation in the local funds budget estimate.

6*th.*—It will be seen that both in Statement B and Statement C the disbursements from the "Improvement Fund" will be estimated under three heads :

I.—Roads (column 12 of Statement B, column 5 of Statement C).

II.—Primary education (column 13 of Statement B, column 6 of Statement C).

III.—Local improvements (column 14 of Statement B, column 7 of Statement C).

The fourth head (column 15 of Statement B, and column 8 of Statement C), is merely one for adjustment of any deficit which may be standing against the fund from previous years ; but this column is only provided for the correction of irregularities, as such excess expenditure should never be allowed.

Digitized by Google

7*th.*—As regards the amount assigned to Roads (column 12 of Statement B, column 5 of Statement C), the amount estimated as a charge against this fund will be taken credit for at once in the budget estimate of the "District Road Fund" of the District, as "Contribution from the fund for improvement of Government and temporarily-settled estates," and arrangements must be made between the Accountant-General and the Public Works Department to make sure that this is properly done; the sum so transferred will be disbursed subject to all the rules of that fund as to sanction, &c.

8*th.*—The amounts entered under each district as "Assigned for primary education," will be at the disposal of the Magistrate of the district, and his authority will be sufficient to enable the Accountant-General to pass the items of disbursements.

9*th.*—There remains the item "to be expended on local improvements" in each district (column 14 of Statement B, column 7 of Statement C). The expenditure under this head, up to the amount provided in the estimate of each district, must be disbursed, under the sanction of the Commissioner, for works and projects costing not more than Rs. 1,000; above that amount the Board's sanction will be necessary, and in these cases it must be borne in mind that express sanction to execute the work must be obtained. The mere fact of the cost of the work being included in the estimate which the Board has passed will not suffice. It will probably be most convenient for the Commissioner to send up simultaneously with the estimates a letter describing the different projects provided for in the estimates, and asking for the Board's sanction to the execution of those to which such sanction is required.

10*th.*—These instructions will, it is believed, suffice to enable the Accountant-General to deal with the expenditure. The Commissioners will be responsible that the spirit of the Government order is adhered to, which requires that the amount assigned from the revenue paid by each estate shall be expended so as to benefit that estate. It is not intended that the expenditure shall be actually on the very estate; for instance, an estate may derive great benefit from a road or tank constructed, or a school established, on a neighbouring estate. These remarks apply to all three portions of the assignment.

11*th.*—*Receipt side of the estimate.*—With regard to the receipt side of the estimate, it is only necessary to observe that column 6 of Form B will shew that half of the amount of road cess, which, having been paid by Government as superior holder, is recoverable from tenants of Government estates and the holders of temporarily-settled estates under the law and the orders of Government. This item will always be half the item entered on the disbursement side, column 12, as "road cess payable." This will be sufficiently near for the purposes of an estimate, although there will be an error disturbing the exact proportion occasioned by demands on account of the year not being recovered from the tenants within the year, and similar causes.

12*th.*—As soon as possible after the close of each year, the Accountant-General will draw up a memorandum from the accounts of the year, shewing for each district whether the actual charges against the improvement fund were more or less than the actual receipts, and this surplus or deficit must be adjusted in the second year following. If the Accountant-General's balanced account shews a surplus, the Collector will take credit for it in column 7 of Form B, or column 3 of Form C, as the case may be, in the year for which he is preparing the estimates; if a deficit, he will enter it in column 15 of Form B, or column 8 of Form C, as the case may be, of the disbursement side.

13*th.*—Under this arrangement it will be seen that adjustment for any given year will be made in the next year but one. The adjustment for 1874-75, for instance, cannot be made in 1875-76, because the estimates of 1875-76 will have been prepared before the close of 1874-75: it must therefore be made in the estimates for 1876-77.

14*th.*—Collectors will take care that the amount of road cess, which is recovered from tenants in Government estates, and from the holders of temporarily-settled estates, of which the road cess has been paid from this fund, are duly credited to the fund, and not directly to any other head of account, and Commissioners should check this.

Digitized by Google

A.

Estimate of the Assignment from Imperial Land Revenue to the Fund for the Improvement of Government and Temporarily-settled Estates, for the year 187 - 7 .

Division ——— .

1	2	3	4	5
District.	* Estimated net revenue from all Government estates, with number of estates.	Estimated net revenue from those of the temporarily-settled estates belonging to private individuals, out of which an assignment may be taken under the orders, *i.e.*, all estates of this class which have been brought under re-settlements since the orders making the assignment were passed by Government, and all which may be coming under re-settlement in the year to which the estimates refer, with number of estates.	Total of I and II.	Assignment calculated at 3† per cent. on the amount shewn in column 4.

* Where a commission is paid on the collection of revenue, the amount on which the assignment is calculated will be revenue less commission; but, when revenue is collected by Government establishments, the whole revenue paid into Government treasuries is to be the base of assignment.

† Except in the Bhootan Dooars, where the calculation will be made at the rate of one anna for every rupee which reaches the treasury, or 1-17th of the net revenue.

Digitized by Google

B.

Estimate of the Fund for the Improvement of Government and Temporarily-settled Estates, for the year 187 , *in Districts in which the Road Cess is levied.*

Division ——— .

RECEIPTS.								DISBURSEMENTS.							
Districts.	* Assignment from Imperial Funds as per column 5 of Statement A.	Amount of Road Cess Recoverable.					Balance of the funds unexpended in the year 18 as per Accountant-General's balanced account for that year.	Total receipts (columns 2, 6, and 7).	Full amount of Road Cess Payable.				Assigned to primary education.	To be expended on local improvements.	Amount expended in the year 18 in excess of sum at credit of the Fund, as per Accountant-General's balanced account for that year.
		From tenants on all Government estates which are settled ryotwaree.	From farmers or tenants on all Government estates which have been settled otherwise than ryotwaree, and on account of which disbursements are estimated for in column 10 of this statement.	From holders of temporarily-settled estates not the property of Government, on account of which disbursements are estimated for in column 11 of this statement.	Total of columns 3, 4, and 5.				On all Government estates settled ryotwaree.	On Government estates which have been settled otherwise than ryotwaree since 1st April 1874, or which will be so settled in the year under estimate.	On temporarily-settled estates not the property of Government, which have been re-settled since 1st April 1874, or which will be re-settled during the year estimated.	Total Road Cess payable.			
1	2	3	4	5	6		7	8	9	10	11	12	13	14	15

C.

Estimate of the Fund for the Improvement of Government and Temporarily-settled Estates, for the year 18 , *in Districts in which the Road Cess is not levied.*

Division ——— .

Receipts.				Disbursements.				
District.	* Assignment from imperial funds.	Balance of the Fund unexpended in the year 18 , as per Accountant-General's balanced account for that year.	Total receipts, columns 2 and 3.	Assignment for roads.	Assignment for primary education.	To be expended on local improvements.	Amount expended in year 18 , in excess of sum at credit of the Fund, as per Accountant-General's balanced account for that year.	Total disbursements, columns 5, 6, 7, and 8.
1	2	3	4	5	6	7	8	9

† *Column* 2.—Enter the amount of the assignment at 3 per cent. on the net revenue of the estates from which the assignment may be taken.

Columns 3 *and* 8.—The figures for one or other of these columns, as the case may be, will be supplied by the Accountant-General after he has adjusted the accounts for the second year before that to which the estimate refers.

* Where a commission is paid on the collection of revenue, the amount on which the assignment is calculated will be revenue less commission; but when revenue is collected by Government establishments, the whole revenue paid into Government treasuries is to be the base of assignment.

† Except in the Bhootan Dooars, where the calculation will be made at the rate of one anna for every rupee which reaches the treasury, or 1-17th of the net revenue.

Digitized by Google

Calls attention to Correspondence with Government, explanatory of a previous order of Government regarding Settlements, and makes alterations in s. 2, Ch. VII of the Board's Rules.

No. 3.

THE Member in charge desires to call the attention of all Revenue officers to certain correspondence which has lately passed between Government and the Board, explanatory of the intentions of Government as expressed in para. 11, and in Clauses 5 and 6, para. 14 of the Government Order No. 3156, dated 21st August 1871.

Vide Board's Circular Order No. 486, dated 31st August 1871.

2. In a recent letter the Member in charge referred to Government for instructions regarding the nature and extent of the proprietary right which the above order was intended to confer upon settlement-holders and purchasers of Government estates. With regard to settlement-holders, it was pointed out by the Board that whereas the original orders had declared that the persons with whom the settlement might be made would be proprietors, and would be entitled to have future settlements made with them, the subsequent orders of Government No. 1840, dated 22nd July 1873, ruled that such settlement-holders were to be looked upon only as having been admitted to a quasi-proprietary right of occupancy, and that their rights would be limited to the first option of accepting a re-settlement at such rates of assessment as might be fixed upon by the revenue authorities. It was represented that these orders left it uncertain whether the rights of the settlement-holders were transferable by sale, whether leases could be cancelled for default, and whether the provisions of the sale law (Act XI of 1859) were applicable to the tenures in question. With regard to Government estates sold with a reservation of the right to revise the jumma at the end of the term of settlement, it was asked whether the purchasers of such estates were to be considered as enjoying full proprietary rights, or whether they were merely entitled to take the re-settlement at the revised jumma, if they chose to do so.

3. In reply, the Government have issued instructions which define precisely the rights of both settlement-holders and purchasers. With regard to settlement-holders, who will ordinarily be village headmen or ryots, it is explained that they are not to be considered as "proprietors" of "estates" in the sense in which those words are used in Section 1, Act VII (B. C.) of 1868. It is to be clearly understood that it is not the desire or intention of Government to surrender its proprietary right. For this purpose it is desirable that such expressions as "proprietor" and "malik" should be excluded from leases of Government estates which may be granted in future. On the other hand, it is not desired to reduce the settlement-holders to the position of mere farmers. They will be entitled "malgoozars," which appears a suitable word of intermediate meaning, expressing an interest higher than that of a farmer, but less absolute than that of a proprietor.

4. The estates are to be settled with these malgoozars for a fairly long term of years, such as is provided by para. 5 of the Government Order No. 3156 of the 21st August 1871. The form of lease is given in the Form A annexed, and this form should be adopted in all future settlements of this kind. It will be observed that by the conditions of this lease, the settlement rights are made heritable, but not otherwise transferable in the event of the interest of the settlement-holder being transferred by sale in execution of decree, or by other order of the Civil Court; the Collector is empowered to annul the settlement and to re-enter on direct possession; the lease may also be cancelled in default of payment of the Government demand, and all processes applicable to farmers under Act VII (B. C.) of 1868, are made applicable to the lessees. On the expiry of the term of the settlement, the former lessee or his heir will have, as of right, the option of accepting the new settlement, subject to such revised jumma as may then be imposed, but in the event of his refusing to accept it, his interest in the estate will cease altogether.

5. With regard to Government estates which may be sold subject to a revision of the jumma at the end of the term of settlement, the Government have explained that the purchasers of such estates are to be considered as proprietors in the ordinary acceptation of the word, and that the entire proprietary right of Government will be transferred to them, subject only to the reservation of the right to revise the jumma at the conclusion of the term of settlement, and thereafter, on the expiration of all future settlements. The estates will consequently be liable to sale for arrears of revenue, the purchasers will be at liberty to alienate them at their pleasure, and if on re-settlement,

Digitized by Google

they their heirs or assigns should refuse to engage, they will be entitled to receive malikana.

6. It is desirable that these conditions should be embodied in the certificate of sale, and a Form B is accordingly annexed, which should be adopted in all future sales, a certificate in this form being given to the purchaser on the completion of the sale and payment of the purchase-money, the name of the purchaser being simultaneously entered in the general register of estates.

7. The following alterations should be made in Section 2, Chapter VII of the Board's Rules :—

1*st*. Clause 10, page 148. Expunge the words "(which appears in an appendix to the Gazette, specially appropriated to the purpose)."

2*nd*. After the word "Government" in the "advertisement of sale" enter "as specified in the conditions of sale below."

3*rd*. For the note below the "advertisement of sale," substitute—"The purchasers will be subject to the following conditions of sale.

(Here embody the conditions of sale mentioned in clause 12.)

4*th*. Clause 12. For the words "notified at the head of the appendix above referred to," substitute "to be embodied in the advertisement of sale."

5*th*. For the first condition of sale substitute—"The purchaser of this estate will be considered as the proprietor of the estate, and the entire proprietary right of Government in such estate will be transferred to him, the only right reserved by Government being the right of revising the jumma at the conclusion of the term of the present settlement, and on the expiration of all future settlements. If on re-settlement, he should refuse to engage, he will be entitled to malikana. The estate will be sold subject up to the year to the Government revenue against it to the highest bidder above the upset price."

6*th*. Expunge the 5th condition on page 149.

7*th*. Clause 16. In the notification of sale after the words "rights and interests of Government in the estate of————" insert the words "except the right of revising the jumma hereafter."

8*th*. Clause 18. Strike out the words "in the terms of the advertisement," and substitute for them "in the Form B annexed to Board's Circular No. 3 of December 1874."

A.

I, , resident, ryot, under-tenant or village-headman, as the case may be, of Government Estate in the district of execute this engagement. I take the malgoozari settlement of the said Government estate, measuring beegahs equal to acres for the term of years, from the year to the year at a net annual jumma of Rupees .

2. The rights conveyed to me under this engagement are those of malgoozar as hereinafter defined ; and I bind myself to respect the recorded rights possessed by the ryots, under-tenants, village-headmen, as the case may be, in the said estate.

3. I will collect the rents from the ryots under-tenants, as the case may be, and pay the Government revenue, kist by kist, according to the instalments noted at the foot of this engagement ; and I will raise no objection on the score of drought and inundation or any other providential visitation ; nor will such objection be allowed. But the rents, if any, which I may be able to collect from waste lands in the estate will be mine until the expiry of this lease.

4. If in any year during the currency of this engagement I default in the payment of the Government demand, this lease may be cancelled, and I may be ejected at the will of the Collector ; and all processes applicable to farmers under Act VII (B.C.) of 1868 shall be applicable to me.

5. I will file, without objection during the currency of my lease, any papers which the Collector may require from me. If I do not, the Collector will have power to take action against me according to law.

6. I will not be able to transfer by private or public sale or mortgage, the settlement rights conveyed to me under this lease, nor will I be able to sublet the estate.

7. I will not sell or cut any trees on the estate whether bearing fruit or not, and if through my fault any damage is done to the estate, I will hold myself responsible for it.

8. On the expiry of the term of the settlement I shall have, as of right, the option of accepting the new settlement, subject to such revised jumma as may then be imposed ; but failing this acceptance, my right and interest as lessee will entirely cease, and the Collector will be at liberty to make with others any fresh arrangement that may appear advisable.

Digitized by Google

9. The Collector will have power to annul my lease and to re-enter on direct possession of the estate at once in the event of the rights conveyed to me under this engagement being transferred by sale in execution of decree or other order of the Civil Court.

10. If I infringe any of the foregoing conditions, my lease will be liable to cancelment, and I to ejectment, at the will of the Collector without the intervention of any Court of law.

11. In the event of my dying during the continuance of the term of this engagement, the lease shall not lapse, but shall devolve upon my heir for the remaining period of the original engagement.

SCHEDULE OF KISTS.

B.

The proprietary right of Government, except the right of revising the jumma hereafter, in estate No. on the revenue roll of the district of , consisting of an approximate area of beegahs equal to acres and bearing a net annual revenue of Rupees , has been sold to son of , resident of , for the sum of Rupees .

2. The existing jumma of Rupees has been fixed up to the year . The Government will have the right of revising the jumma at the conclusion of the term of the present settlement, and it reserves a similar right to be exercised from time to time on the expiration of all future settlements.

3. The purchaser possesses the advantages and is consequently under the obligations of the ordinary landlord. He is at liberty to alienate his property at pleasure, and if on re-settlement he should refuse to engage, he will be entitled to malikana. The estate will be liable to sale for arrears of revenue.

4. This sale is subject to existing leases and to the rights conferred by the settlement proceedings and by the laws in force, and the purchaser is bound to respect the rights of resident cultivators who have signed the schedule of assessment prepared by the revenue authorities.

5. The purchaser will perform the duties of putwari as required by law. (*Note*—This will be added only where such an arrangement is made, otherwise it will be omitted).

6. This sale is subject to the approval by the higher authorities of the character of the purchaser.

Cancels 1st part of statement prescribed by Board's Circular No. 1 of 1874 regarding establishments.

No. 4.

THE upper portion of the form of statement prescribed in the Board's Circular No. 1 of May 1874 is cancelled, the second portion only should be used in future in applications for increase of establishments. The necessary correction should be made in clause 3, Chapter VI, Section 10, page 127, Board's Rules.

A. MONEY ESQ., C.B.

Circulates Government Resolution on the cancellation of Court Fee Labels, and cancels Board's Circular No. 13 for November 1872.

No. 5.

THE following Resolution of the Government of India, on the subject of the cancellation of Court Fee Labels, is circulated in supersession of Circular Order No. 13 for November 1872 :—

No. 6307, dated Fort William, the 29th October, 1874.

Resolution by the Government of India, Financial Department,

Read again—

Financial Order No. 3362, dated 30th November 1870, suggesting that it would be expedient to instruct the Courts to cause the stamp labels affixed to copies, certificates and other documents issued by them, and liable to a fee under "the Court Fees Act, 1870" (Act No. VII of 1870) to be cancelled at the time they are affixed.

Read—

A letter from the Government of Bombay, No. 4194—179R, dated 7th August 1874, stating that the course suggested in the above order is apparently at variance with the provisions of the law as at present enacted.

Digitized by Google

RESOLUTION.—On a reperusal of the Court Fees Act, 1870, the Governor General in Council observes that the Act contains clear provisions as to cancellation, which should be followed.

2. Under Section 30, the stamp can only be cancelled by the Court or office receiving the document to which the stamp has been affixed. Such cancellation can be effected in one way only,—namely, by punching out the figure-head, and this cannot be done twice. Consequently, the only time a stamp can be cancelled is when the document to which it is attached is filed or acted upon.

3. His Excellency in Council is accordingly pleased to decide that the cancellation of the stamps affixed to "true copies" of papers issued by a Court should be effected by the Court receiving such documents, officers when attesting "true copies" should, however, draw their pen across the stamp.

2. Divisional and District Officers are requested to see that the above orders of Government are invariably carried out.

Circulates Financial Department Resolution regarding the refund or renewal of a stamped paper.

No. 6.

THE following Resolution of the Government of India in the Financial Department, No. 6592, dated 16th November 1874, is published for the information and guidance of all Officers in the Revenue Department.—Read again—

Financial Circular No. 3767, dated 23rd October 1873, regarding the prevention of frauds in the Stamp Department, ruling that when the Collector of a district sanctions a refund or renewal of a stamp paper, he shall then and there record his reasons for granting such refund or renewal, shall punch or mark the stamped paper in such a way that it can never be presented again, and shall then forward it for destruction to the Commissioner or Superintendent of Stamps. Read—

A letter from the Chief Commissioner of Oudh, No. 2860, dated 20th August 1874, enquiring whether stamps that are returned and on which refund is allowed, not because they are spoiled, but because they are not wanted, are nevertheless to be treated as spoilt stamps and destroyed instead of being resold.

RESOLUTION.—The Governor General in Council observes that stamps sold to the public, when returned, will be generally more or less soiled or disfigured, and should not be re-issued. If a refund of the value of any such stamp is granted, the Collector should follow the course laid down in Financial Circular No. 3767, dated 23rd October 1873. Those stamps, however, which are taken back from a stamp vendor or his heirs, may be placed in store and re-issued.

HON'BLE V. H. SCHALCH, C.S.I.

Erratum.

For "4 to 9," in line 4 of Circular Order No. 9 of November 1874, read "4 to 10."

Explains how cols. 16 & 18 of Return No. XVI are to be filled up.

No. 7.

SEVERAL District Officers have recently submitted Return No. XVI without completely filling up column 16, Table I. The omission is apparently due to a misconception of the orders conveyed in the Board's Circular Order No. 6 of November 1872, which referred *solely* to column 18 of the Return.

In future, it must be distinctly understood, that all estates exempted from sale must be accounted for in column 16 of Return No. XVI, and that column 18 should shew only arrears that may remain unpaid after an estate is exempted from sale. Arrears remaining unpaid on the last day of payment, but paid before exemption, should *not*, however, be entered in column 18.

Enjoins the preparation by Collectors of briefs of Wards' cases which are appealed to the High Court.

No. 8.

IT has been brought to the notice of the Board that in many instances Collectors, instead of preparing briefs of Wards' cases which come up in appeal before the High Court, merely refer the Legal Remembrancer to the records of the case previously submitted. The Member in charge requests the attention of all District Officers, in whose districts there are Wards' estates, to the necessity of preparing such briefs in future.

Digitized by Google

Their local knowledge ought to enable Collectors to do this better and more easily than it can be done in the Office of the Legal Remembrancer, or in that of the Senior Government Pleader.

A. MONEY, ESQ., C.B.

Makes additions to cl. 23, s. IX, ch. II, p. 30 and to cl. 10, s. XIV, ch. V, p. 74 of Board's Rules.

No. 9.

THE following is added as Clause 23, Section IX, Chapter II, page 30 of the Board's Rules :—

23. Excise Darogahs should remit daily their collections of excise revenue to the Sudder or Sub-divisional Treasuries, provided they are at the Sudder Station of a District or the head quarters of a Sub-division, or not more than two miles from either; but when the Treasuries are situated at greater distances, the remittances should be made every second or third day according to the distance.

2. Add the following to Clause 10, Section XIV, Chapter V, page 74 of the Board's Rules :—

"The quantity of opium to be kept in the custody of a Darogah should be fixed in each case by the Commissioner."

Addition to para. 13 of the Instructions for the administration of the Land Acquisition Act, X of 1870, and to para. 1 of the Special Instructions to be observed when land is required for a railway, &c.

No. 10.

AT the end of para. 13 of the Instructions for the Administration of the Land Acquisition Act, X of 1870, add the following :—

"The Ameen's plan or map should be prepared on paper of the same quality as that used by the Survey Department for village maps, and when the map or plan has been finally approved of by the Collector under the provisions of Clause 15 of these Instructions, a duplicate authenticated copy should be forwarded to the Board of Revenue for record, prepared on tracing cloth."

2. The following addition is also made to para. 1 of the Special Instructions to be observed when land is required for a railway, road, canal, &c. :—

"The rule laid down in para. 13 of the general Instructions regarding the description of paper on which Ameen's plans should be prepared, and the submission of a duplicate copy to the Board of Revenue, will also apply here."

JANUARY 1875.

HON'BLE V. H. SCHALCH, C.S.I.

Addition to Board's Rules, cl. 1, s. VI, ch. XVIII.

No. 1.

THE following is added to Clause 1, Section VI, Chapter XVIII of the Board's Rules :—

"Each Commissioner should also give a "memorandum shewing the names of the "officers who held the office of Commissioner "of the division during the year, and the "dates on which each received and made "over charge of it, respectively."

After the words "(*vide* Circular Order No. 5 of October 1873)" in Clause 3 of the same Section should be added "a further head, *viz.*, "that of nominal 'remissions,' has been added "by Circular No. 3 of February 1874, and "should also be noticed."

Publishes revised Rules for the supply of copies of, and information respecting, papers and documents in Collectors' Offices.—Register No. 62 cancelled.

No. 2.

THE revised rules for the supply of copies of, and information respecting, papers and documents in Collectors' offices, having been approved by Government, are published below for the information and guidance of all officers concerned. These rules should be introduced at once. They have been substituted for those contained in Section VI. Chapter XIII, pp. 210, 211 of the Board's Rules. Register No. 62 (pp. 216 and 224 of the Board's Rules) is hereby cancelled.

Digitized by Google

2. Copies of the new rules in the vernacular will be supplied to District Officers in due course.

3. Instructions will issue to the Superintendent of Stationery to print off Forms A to H of the new rules and to keep a quantity in store to meet the requirements of local officers, who should indent for their supplies in the usual manner.

Section VI.—Rules for the supply of copies of, and information respecting, papers and documents in Collectors' offices.

1. APPLICATIONS are to be received from the public for—

(I.)—Information respecting the contents of papers and documents in the Collector's office, whether such information be or be not required for the purpose of correctly describing such documents in applications for copies of the same.

(II.)—Unstamped copies of papers and documents, of which copies may by law be given on unstamped paper.

(III.)—Stamped copies of papers and documents.

2. All applications of the first two classes are to be made at a place and to the officer designated by the Collector for that purpose, and between the hours of 10 and 12, except where cutcherry is held in the morning, when the hours should be between 7 and 9 A.M. The officer to be so designated shall be either the sheristadar or some other paid ministerial officer belonging either to the English office or to the munshi-daftar of the Collector's Court.

3. All applicants for copies (whether stamped or unstamped) must supply paper at their own cost for the copies required.

4. Applications for information (except applications on the part of recorded proprietors of estates on the revenue roll for information regarding the state of their accounts, which are exempted from the operation of the rules), shall be on a printed Form (A) in duplicate, to be obtained from the Nazir at the cost of one pice per sheet. The applicant is to present it with the duplicate spaces reserved for the date, his name and residence, the particulars of the information required, and the searching fee tendered by him, filled up. The officer receiving such application is to enter in duplicate in the 1st column the consecutive number, and in the 7th column his signature. He will also enter in duplicate, in the 6th column, the date and hour if necessary (see Rules 5 and 9 below), by which the information is to be furnished. The upper and lower portions of the form with columns 1 to 7 thus filled up, will then be separated. The lower portion will be made over to the applicant with a direction to return with it at the time fixed. The upper portion will be passed on to the amlah to whose department it pertains, who will note in the 8th column the date, and, in cases where the extra fee has been paid, the hour of receipt, and after entering in the column for remarks the necessary information, return it to the receiving officer before the time prescribed. On the applicant's re-appearance, this upper portion bearing the information will be made over to him, and the lower portion, bearing his dated receipt in the column for remarks, will be taken from him and recorded in the office. These forms will be filed, in the order of their admission, in a separate series for each month.

5. The ordinary searching fee shall be uniformly four annas for all cases, and when this fee is paid, the time to be fixed for supplying the information required shall not, without the special orders of the Collector in each case, be later than the hours 12 to 1 P.M. of the third open day after the presentation of the application, the day of presentation being excluded. The extra searching fee shall be an additional 8 annas, by payment of which the applicant shall be entitled to receive the information applied for by 3 P. M. on the same day on which his application is presented.

6. The receiving officer shall enter in a register in Form C all fees received by him under the above rule, and shall pay the amount daily into the treasury with a chalan (Form H) countersigned by the Collector, or, in his absence, by the officer in charge of the Collector's current duties.

7. If in any case the information applied for (under the latter Clause of Rule 5) cannot be supplied by the hour fixed for supplying it, the extra searching fee deposited by the applicant shall be refunded to him by an order on the treasury signed by the Collector. A receipt for each amount so refunded shall be taken from the payee in the column for remarks in the form to be filed by him under the last Clause of Rule 4. In such cases the Collector shall cause the requisite information to be supplied to the applicant free of the extra charge. Provided that in any particular case, on sufficient cause shewn, the Collector may permit a definite postponement of the time fixed for furnishing the

Digitized by Google

information required, signing the order for such postponement in column 6 of Form A.

8. Applications for unstamped papers and documents shall be in Form B, which will be obtainable in loose sheets, in the same way and at the same cost as Form A. Every such application shall be numbered consecutively as received, and the body or main portion of the form shall be passed on to the amlah concerned; the first seven columns having been filled up by the applicant, and the 8th, 9th, 10th, and 11th by the receiving officer, by whom also a note corresponding to the entry in column 9 shall be invariably made on the counterfoil, which is to be returned to the applicant. The copy will be returned to the receiving officer by the time fixed with the body of Form B attached to it, and he will make over the copy to the original applicant on his appearance with the counterfoil, and his payment of the copying fees, as provided in Rule 12 below, taking his receipt for the same in the last column of the Form, in which the date of such receipt will also be noted.

9. The provisions of Rules 5 and 6 shall be applicable, *mutatis mutandis*, to the payment and credit of the searching fees to be charged for unstamped copies (the entries being made in Register D), and to the times within which the copies are to be delivered, and to the consequence of non-delivery; provided that the extra fee for delivery of a copy by 3 P.M. of the day on which the application is made shall be 1 rupee instead of 8 annas; provided also that in any case in which the applicant shall shew, by the production of a duplicate form which has been made over to him under the last Clause of Rule 4, that he has already paid a fee for information connected with the same document, a copy of which he desires to obtain, the amount of such fee shall be deducted from any fee chargeable under this rule, the deduction being explained in the column for remarks in the Register. Should the applicant be unable to fill up columns 3 and 4 of the Form, he must, in the first instance, submit an application for the necessary information in Form A.

10. A separate application must be made for copies of all papers, or for information required, in connection with each separate cause or matter, *e.g.*, if copies are required of four separate papers in one record or nuthee, only one application is necessary. When copies of, or information relating to, papers connected with different matters or causes are wanted, as many applications are necessary as the matters or causes to which they relate.

11. Copying fees are to be levied at the rate of 2 annas for every hundred vernacular words, and 3 annas for every hundred English words, four figures counting as one word.

12. With every application for an unstamped copy, the applicant shall deposit, as security for the ultimate payment of the copying fees, 8 annas if the application be for a copy of a vernacular document, and 1 rupee if it be for a copy of an English document, except in some districts where a relaxation of the rule is permitted in cases where it is known the fees will not exceed a few annas. The amount paid under this rule will in each case be entered by the receiving officer in column 7 of Register D, and the total daily receipts included in a remittance to the treasury separately entered in the daily *Chalan* H, prescribed by Rule 6. On each copy, when completed, the amount chargeable shall be noted as follows:—

"Number of words (English or vernacular) in the copy is—

	Rs.	A.	P.
At annas per 100 words			
Deduct deposit			
Balance due to (or from) applicant			

(Sd.) A. B.,
Copyist."

13. On applying at the end of the period specified in the counterfoil, as prescribed in Rule 8, the applicant shall be required to pay the balance of the copying fees, or if there be a balance in his favor, it shall be repaid to him by an order* on the treasury under the signature of the Collector. The settlement of this account shall be attested, both on the back of the copy and in the last column of the Form B, with the signature of the applicant for the copy. The forms shall be recorded in the office, filed in the order of their admission in a separate series. The balance of copying fees paid by the applicant, or the refund made to him, as the case may be, shall be entered in the appropriate column in the Register. Should any applicant delay for more than a week after the period fixed for delivery of the copy to apply for the same, the fees paid by him and his deposit shall be forfeited. All such orders

* The form of the order should be the same as the usual deposit-refund form "*mutatis mutandis*."

Digitized by Google

of forfeiture shall be noted by the receiving officer in the column for remarks in the Register, and shall be brought to the Collector for signature on the day of forfeit. But nothing in this rule shall deprive the copyists of the remuneration due to them (*vide* Rule 17.)

14. In any case in which the copy required shall not have been prepared by the time of the re-appearance of the applicant with the counterfoil form, such time not being earlier than the period fixed for the delivery of the copy, the whole of the searching and copying fees paid by the applicant shall be refunded to him by an order on the treasury signed by the Collector. In such cases the Collector shall cause the copy to be delivered to the applicant free of charge. Provided that whenever it shall appear that the delay has been owing to the negligence of the officer whose business it was to search for the document, and not to that of the copyist, the Collector shall direct the refund of the searching fee only, fixing a fresh definite period for the delivery of the copy. Provided also that, in any particular case, on sufficient cause shown, the Collector may permit a definite postponement of the time for delivery without refund of searching or copying fee. All postponements under this rule shall be granted by an order signed by the Collector in column 9 of Form B.

15. Applications for stamped copies must be made by petition to the Collector in Form B, with a stamp affixed to it of the value of one anna.* The form will then be made over to the officer appointed to receive applications, the applicant being directed to attend during the prescribed hours on the next open day to deposit his fees. The provisions of Rules 8 to 14 shall apply to the subsequent treatment of the applications, the necessary particulars being entered in Register E. The following additional rule will also be observed.

* (Provided always, that when the application is for a copy which the party applying is legally entitled to receive, no stamp shall be required, and the application may be made either verbally or on unstamped paper.)

16. Before delivery of the copy, the requisite adhesive stamp or stamps shall be affixed to it, and paid for by the applicant. under the rules in force for the payment of court fees.

17. All receipts and refunds of searching fees under these rules shall be credited and debited respectively in the treasury accounts to Government. All receipts and refunds of copying fees shall be credited and debited respectively to a separate local fund, to be called the 'Copying Fees' Fund,' and the balance of this fund on the last day of each month shall be paid by the Collector to the copyists by whom the copies have been prepared, the amount due to each individual being ascertained from the Registers. The Collector should take special care to see that these payments are promptly and regularly made.

18. Copies of public documents which may be used as evidence, even against the Government, are never to be withheld from applicants; but copies, whether authenticated or not, of written arguments, discussions, or opinions of public officers written previously to a decision, as they can be no legal evidence, are not to be given. Copies of correspondence on the subject of suits pending in the Courts of justice are not to be granted without the permission of the Board of Revenue.

19. The ministerial officer in charge of the department in which the document of which a copy is applied for is found at the time of such application, shall be held personally responsible for the observance of the above rule. In every case in which there shall be any doubt as to the propriety of giving the copy, such officer shall take the Collector's order on the subject before the document is made over to the copyist. Whenever a copy is refused, any deposit of copying fees which may have been made by the applicant shall be refunded to him. Searching fees shall not be refunded under such circumstances.

20. No copy shall be authenticated without the production before the authenticating officer of the Collector's order upon the original petition applying for the copy.

21. The Collector is to license as many copyists as can supply all applicants with copies within the periods specified by these rules, and no one but a licensed copyist must be employed in the preparation of copies. But when the copies applied for are few or not sufficient to induce an outsider to take a license for the work, and the work generally is light, the Collector may employ an officer of the fixed establishment to do the copying work without detriment to his other duties.

22. For copies of the surveyor's village plans, supplied on the requisition of private parties, the ordinary rate is to be 1 rupee per sheet;* but should

* By sheet is not to be understood the paper employed in copying the plans, but the sheet of which each plan is composed.

Digitized by Google

the internal delineations be intricate, and the labor be enhanced in proportion, the rate may be increased at the discretion of the Collector within the limit of 2 rupees per sheet. For copies of takbast maps, the ordinary fee to be charged is 4 annas per sheet, and of khasra maps 8 annas per sheet; subject to increase, at the discretion of the Collector, to the same rate as for professional maps, and even beyond it, in proportion to the amount of labor involved in copying.

23. Collectors are to encourage in every legitimate way the widest distribution of these maps among those interested in them.

24. When one copyist only is entertained, the task of comparing must be performed by one of the officers of the fixed establishment. When two or more copyists are employed, they should compare for each other. When six or more copyists are continuously employed, a comparer may be entertained to compare the copies prepared by all, to be paid at the rate of Rs. 12 per mensem, levied from the copyists in proportion to their receipts.

25. The names of both the officers employed on the comparison must always be noted on the copy. Each copy must be attested by the record-keeper or other native officer specially authorized to compare and attest copies, who is responsible jointly with the comparer for the correctness of the copy.

26. Commissioners are at liberty, if the demand for copies from their records makes the arrangement advisable, to appoint a licensed copyist for their preparation.

27. No fees are to be demanded or paid for searching for or copying papers required by public officers for public purposes.

28. Nothing in these rules is to be held as interfering with the right of parties or their authorized agents to inspect the records of pending cases, under such safeguards as the Collector may think necessary against the removal or alteration of documents and the publication of privileged communications.

29. Admittance to the record-room should be absolutely prohibited to all persons, other than the Deputy Collectors and Assistant Collectors serving in the district and the officers of the Collector's Court, except on production of a written order for admittance signed by the Collector.

30. Copies of these rules in the vernacular are to be conspicuously exhibited in Collectors' offices.

31. Nothing in these rules applies to sub-divisional offices, where existing arrangements should be maintained.

A.

Form of Application for Information.

[Upper portion.]

1	2	3	4	5	6	7	8
No. and date.	Name and Residence of Applicant.	Nature of the information required.	Ordinary Fee.	Extra Fee.	Date on which the information is to be ready.	Signature of Officer receiving the application.	Remarks.

Lower portion same as above, and divided from upper portion by a pricked line.

Digitized by Google

B.

Form of Application for Copies.

B [Counterfoil].

Name of Applicant

Date of receipt of application

Time by which the copy required is to be ready.

(Printed line.)

1	2	3	4	5	6	7	8	9	10	11	12
No. and date of Application.	Name, Residence, and description of Applicant.	Specification of Paper of which the copy is required.	Case or Proceeding in which such Paper is to be found, or was filed.	Ordinary Searching Fee.	Extra Fee.	Deposit on account of Copying Fee.	Name of Office or Department where the paper in question is to be found.	Time when copy is to be ready.	Name of Copyist.	Name of Officer receiving application, who fills up the three preceding columns.	REMARKS.

Digitized by Google

C.

Form of Register of Applications for Information.

1	2	3	4	5	6	7		8		9
No.	Date of Application.	Name and Residence of Applicant.	Date when information was supplied.	Ordinary Fees paid.	Extra Fees paid.	Amount of Fees forfeited.		Refunds under Rule 7.		Balance, columns 5, 6 and 7, minus column 8.
						Date.	Amount.	Date.	Amount.	

D.

Form of Register of Applications for Unstamped Copies.

1	2	3	4	5	6	7	8		9		10	11		12						13	14
														Refunds under Rules 14 and 19.							
							Balance of Copying Fees paid under Rule 13.		Amount of Fees forfeited.			Refunds under Rule 13.		Ordinary Fees.		Searching additional Fees.		Copying Fees.			
No.	Date of Application.	Name and Residence of Applicant.	Date of delivery of copy.	Ordinary Fees paid.	Extra Fees paid.	Deposit on account of Copying Fees.	Date.	Amount.	Date.	Amount.	Total of columns 5 to 9.	Date.	Amount.	Date.	Amount.	Date.	Amount.	Date.	Amount.	Balance, column 10, minus 11 or 12.	Remarks.

Digitized by Google

E.

Form of Register of Applications for Stamped Documents.

1	2	3	4	5	6	7	8		9		10	11		12								13	14
No.	Date of Application.	Name and Residence of Applicant.	Date of delivery of copy.	Ordinary Fees paid.	Extra Fees paid.	Deposit on account of Copying Fees.	Balance of Copying Fees paid under Rule 13.		Amount of Fees forfeited.		Total of columns 5 to 9.	Refunds under Rule 13.		Refunds under Rules 14 and 19.								Balance, column 10, minus 11 or 12.	Remarks.
							Date.	Amount.	Date.	Amount.		Date.	Amount.	Ordinary Fees.		Searching additional Fees.		Copying Fees.					
														Date.	Amount.	Date.	Amount.	Date.	Amount.				

Digitized by Google

DIRECTIONS.—When additional fees are not paid into the treasury in the same mon
application is registered, a new No. should be given for them in the month in which
they should not be credited under the entry in the previous month; *e.g.*, if an app
registered on the 31st March, and the additional fees are remitted to the treasury
April, the column for entering such fees in the register for March will be left blan
for April will be filled in under a new No. These entries should be made in red ink.

N.B.—The abstract at
signed by the Officer
countersigned by th
the end of every mo

F.

Register of Remittances to the Treasury.

Date.	Ordinary Fees.			Extra Fees.			Copying Fees.	
	Register C.	Register D.	Register E.	Register C.	Register D.	Register E.	Register D.	Register E.

Monthly total,

Rs. As. P.

Monthly total of	Register	C,	column	5	..
Ditto	ditto	„	„	6	..
Ditto	ditto	D	„	5	..
Ditto	ditto	„	„	6	..
Ditto	ditto	„	„	7	..
Ditto	ditto	„	„	8	..
Ditto	ditto	E	„	5	..
Ditto	ditto	„	„	6	..
Ditto	ditto	„	„	7	..
Ditto	ditto	„	„	8	..

Grand total as shewn by this Register ..

(Signed) A. B., *Officer*

(Countersigned) C. D., *Collecto*

Date _____

Digitized by Google

G.

N.B.—The abstract at foot must be signed by the Officer in charge and by the Accountant, and countersigned by the Collector, at the end of every month.

Register of Refunds.

Date.	Refunds under Rule 7.	Refunds under Rule 13.		Refunds under Rules 14 and 19.		Daily Total.
	Register C, Column 8.	Register D, Column 11.	Register E, Column 11.	Register D, Column 12.	Register E, Column 12.	

Rs. As. P. Monthly total, Rs.———

Monthly total of Register F. ..

Deduct monthly total of this Register as shewn above ..

Balance, tallying with the balance of the Treasury account of the fund for the month ..

(Signed) A. B., *Officer in charge.*
C. D., *Accountant.*

(Countersigned) E. F, *Collector.*

Date———

Digitized by Google

H.

Chalan.

Accountant's No. *of*

Treasury, Bengal, dated 18

By whom brought.	On what account.	Amount.
		Rs. As. P.
	Ordinary fees	
	Extra fees	
	Copying fees	
	Total, Rs. ...	
Silver and Copper		
Total, Rs. ...		

Treasurer.

Examined and Entered *Accountant.*

No.

Dated 18 .

Name

Office

Alteration in cl. 12, *s.* I, *page* 34 *of Board's Rules.*

No. 3.

AFTER the word "circumstances" in line 11, Clause 12, Section I, page 34 of the Board's Rules, add "(except in the case of rent suits, which are excluded from the operation of this rule)."

Digitized by Google

FEBRUARY 1875.

Hon'ble V. H. Schalch, C.S.I.

Circulates slips of directions contained in Circular Order No. 3 of November 1874.

No. 1.

The directions contained in Circular Order No. 3 of November 1874 having been added as Clause 5, Section V, Chapter VIII, (page 153) of the Board's Rules, the usual slips are herewith circulated.

Permits Managers of Wards' Estates to keep their accounts for March open for a period not exceeding one month, with a view of preventing the entry of large sums of money in Table VI of Return No. XXXI under heading "suspense account."

No. 2.

The Member in charge has noticed that large sums of money are frequently shewn in Table VI of Return No. XXXI under the head "suspense account." This entry has apparently been made in consequence of the real destination of the money not having been known in time to the office preparing the Return. To obviate the necessity for resorting to this practice in future, all Managers of Wards' Estates should keep their accounts for March open for a period not exceeding one month. This arrangement will, it is believed, allow mofussil agents ample time to send in all necessary information.

The delay of one month thus authorized will not, however, warrant any further delay in the submission of the accounts, beyond that period.

MARCH 1875.

Hon'ble V. H. Schalch, C.S.I.

Errata.

Circular Order No. 3 of December 1874, page 83, line 18, for "transferable in" read "transferable. In." Line 21, for semicolon substitute comma. Line 22, for "possession; the" read "possession. The"

In line 2, clause 5, Section VII, Chapter XI, page 180 of the Board's Rules, for "Act XIV of 1859, section 1, clause 12" read "Act IX of 1871."

A. Money, Esq., C.B.

Erratum.

In the Rules 5F to 5H, for the payment of rewards in section 18, Chapter V, page 81 of the Board's Rules, alter the word "Magistrate" to "Magistrate of the District."

Promulgates Rules for Guidance of Proceedings held by District Officers for realization of Stamp Fees in Pauper Suits.

No. 1.

With a view to promote uniformity of practice and to prevent dilatoriness in the proceedings held by District Officers for the realization of stamp fees in pauper suits, the following rules, to be inserted as clauses 6A, 6B, and 6C, in Chapter XXI, page 308 of

Digitized by Google

the Board's rules, are issued for information and guidance :—

6A. Upon receipt of a copy of the decree in a pauper suit from the Civil Court, orders should be immediately issued by the District Officer, or the Deputy Collector at head-quarters in charge of Return No. XXI B, in Forms A and C (see Appendix), the former (A) being addressed to the Government Pleader, and directing him to realize the fees, &c., due in the case ; and the latter (C) being addressed to the Sub-Deputy Collector, Canoongoe or Nazir, as the case may be, and directing such officer to make enquiries regarding the property possessed by the debtor.

When the local inquiry in connection with the decree is required to be made in a sub-division of the district, Form C, after being duly filled in and signed by the District Officer, or the Deputy Collector at head-quarters in charge of Return No. XXI B, should be forwarded to the Sub-divisional Officer, accompanied by instructions in Form B, also in the Appendix, and the latter, after countersigning and addressing it, should cause it to be served upon the officer whom he may select to make the enquiry.

6B. One copy of the report (in Form D in the Appendix) of the Sub-Deputy Collector, Canoongoe or Nazir, as the case may be, when received, should be forwarded to the Government Pleader, and another to the District Officer.

6C. A list of all cases under enquiry should be kept by the Nazir in each office, and he should be required to bring it twice a month, on fixed dates, to the District Officer, or Deputy Collector in charge of Return No. XXI B, if at head-quarters; and to the Sub-Divisional Officer, if in the interior. The supervising officer will then go through the list, enquire what has been done in each case, and satisfy himself as to the validity of the reasons for any delay that may be apparent.

The Commissioners of Divisi
quested to see that these rules ar
followed in the districts of thei

FORM A.

PAUPER SUITS.

CONSECUTIVE No. , 18

Order to realize.

To

THE GOVERNMENT PLEADI

PLEASE take measures to realiz
&c., in the case as noted below :

1	2	3	4	5	6	7
No. of Case.	Court.	Parties' Names.	Value of Suit.	Date of Decision.	Fees, &c., due to Govt.	REMARKS.

Dated 187 .

Digitized by Google

FORM B.

PAUPER SUITS.

CONSECUTIVE No. , 187 .

Order to Sub-Divisional Officer.

To

THE OFFICER IN CHARGE OF THE ——— SUB-DIVISION.

Dated 187 .

PLEASE countersign the annexed order to your * and have it executed with the utmost promptitude, entering the case to which it refers in your register as noted below :—

1	2	3	4	5	6	7
No. of Case.	Court.	Parties' Names.	Value of Suit.	Date of Decision.	Fees due to Govt.	REMARKS.

* The Sub-Divisional Officer to fill in the blank with the words *Sub-Deputy Collector, Canoongoe,* or *Nazir.*

FORM C.

PAUPER SUITS.

CONSECUTIVE No. , 187 .

To

THE* OF

Dated 187 .

YOU are directed to lose no time in enquiring or reporting what property the debtor possesses in the case noted below :—.

Dated the of 187 .

1	2	3	4	5
No. of Case.	Court.	Amount of Fees.	From whom the Fees are due.	REMARKS.

FORM D.

PAUPER SUITS.

CONSECUTIVE No. , 187 .

Report dated 187 .

No. of Case.

Court.

Debtor's Name.

Amount due.

Date of Receipt of order by Report.

With reference to Government Order (copy annexed) regarding ss. 49 and 50 of the General Stamp Act, intimates that documents not correctly prepared are to be considered as insufficiently stamped and treated accordingly.

No. 2.

WITH reference to the copy, printed below, of G. O. No. 7389 of 29th December

* The Sub-Divisional Officer to fill in the blank with the words *Sub-Deputy Collector, Canoongoe,* or *Nazir.*

Digitized by Google

1874, regarding Sections 49 and 50 of the General Stamp Act XVIII of 1869, the Member in charge is pleased to intimate that documents which may not be correctly prepared, as explained in para. 2 of the Government Orders, are to be considered as insufficiently stamped, and treated accordingly :—

"To

"THE CHIEF SECRETARY TO THE GOVT. OF BOMBAY.

"*Fort William, the 29th December* 1874.

"I AM directed to acknowledge the receipt of your letter No. $\frac{5432A}{226R}$, dated 13th October 1874, inviting attention to the defective state of the law as laid down in Sections 49 and 50 of the General Stamp Act XVIII of 1869, and requesting an authoritative decision on certain questions which have been raised by the Collector of Nasik.

"2. In reply I am directed to state that the provisions of Section 50 of the Act, *viz.*, that each of the stamped papers 'shall contain a part of the instrument,' must certainly be strictly complied with, and that, if in any document in which the value of stamp required is expressed by more than one impressed stamp, any blank sheets of stamped paper occur, the document should be considered as insufficiently stamped.

"3. I am to suggest to the Government of Bombay the expediency of issuing a rule under Section 48 of the Act, making it imperative on a stamp-vendor granting a certificate under Section 49 to specify therein the stamps of the highest value below the required value which he can supply to make up such required value. Similar instructions might issue to Collectors. It seems probable that in this way the inconvenience brought to notice might be greatly reduced. The subject will be borne in mind whenever the Act is amended."

2. The following certificate is to be adopted in accordance with the instructions of Government now received :—

"Certified, with reference to Section 49 of Act XVIII of 1869, that a single impressed stamp of the value of Rs. required for this document, is not available, and that the highest value of stamp below the required value which I can at present supply to make up the required value, is that for Rs. ."

HON'BLE V. H. SCHALCH, C.S.I.

Explains that the word "demand" in Cl. 1, Sec. III, Ch. II, p. 23 of Board's Rules means current, *and not* gross *demand, which includes arrears.*

No. 3.

As Clause 1, Section III, Chapter II, page 23 of the Board's Rules, appears in some cases to have been misinterpreted, District Officers should distinctly understand that by the word "demand" therein used is meant the *current* demand, not the *gross* demand, which includes arrears. Setting aside remissions, the current demand must eventually come to the same thing as the average actual collections, and it has been decided not to disturb the rule, which does not really conflict with para. 4 of the rules regarding the preparation of Imperial Budget Estimates contained in the Accountant General's Circular Order No. 232, dated 18th July 1871, as seems to be supposed by some Collectors. The word "*current*" should therefore be inserted before the word "demand" in the first line of the rule above cited.

Requests that the several classes of estates enumerated be accurately distinguished, and that alterations be made in Sec. 4, Ch. XIV, Board's Rules.

No. 4.

THE Member in charge has recently had to notice, in several cases, the inconvenience arising from the failure to distinguish accurately between the several classes of estates, the property of individuals, coming under the management of the Revenue authorities.

2. Setting aside for the moment attached estates, there are four classes of estates so managed :—

(I)—Estates of disqualified proprietors administered by the Court of Wards under Act IV (B.C.) 1870 ;

(II)—Estates of lunatics placed in charge of the Collector by an order of the Civil Court under Section 11, Act XXXV, 1858

Digitized by Google

(III)—Estates of minors not under the protection of the Court of Wards, placed in charge of the Collector by an order of the Civil Court under Section 12, Act XL, 1858;

(IV)—Shares of disqualified co-proprietors in estates that have ceased to be subject to the jurisdiction of the Court of Wards, of which the Collector has been directed to retain charge by an order of the Civil Court under Section 14, Act XL, 1858.

3. It has become too much the practice to call estates of all these kinds "wards estates," a dangerous error, as the law applicable to one class differs materially from that applicable to another. In future, in correspondence on the subject of any estate falling under any of the above classes, the language used should leave no doubt to which class the estate belongs.

4. Besides the four classes described above, there are attached estates. The various circumstances which may lead to attachment are enumerated in Section 4, Chapter XXV, Board's Rules. All such estates are correctly described as "attached," but it is desirable that at the outset of any correspondence involving the administration of an attached estate it should be distinctly stated under what kind of attachment the estate lies.

5. In consequence, however, of Act XXV, 1861, having been repealed, the following corrections should be made in the Section just cited :—

For the present 11th Clause substitute the following :—

"11. Under Section 172, Act X, 1872, "a Magistrate may order the attachment by "the Collector of land paying revenue to "Government belonging to a person accused "of certain crimes, and believed to be "absconding or concealing himself for the "purpose of avoiding service of a warrant."

In line 3 of Clause 12, for "(limited to 30 days)" read "(which is not to be less than 30 days)."

In line 4 of the same Clause, for "Section 183, Act XXV, 1861," read "Section 171, Act X, 1872."

In line 1 of Clause 14, for "Section 319, Act XXV, 1861," read "Section 531, Act X, 1872," and substitute for the present marginal abstract of Clause 14 the words "under Section 531, Act X, 1872, Magistrate cannot direct Collector to attach."

In consequence of recent Rulings of the High Court and the Judicial Committee of the Privy Council, modifies orders made under Regulation XI of 1825 and Act IV (B.C.) of 1868.

No. 5.

In consequence of a series of decisions by the High Court and the Judicial Committee of the Privy Council, among which the now well known case of Lopez *v.* Madan Thakoor and others,* reported at pages 521—528, Volume V of the Bengal Law Reports, is the most noteworthy, it has become necessary to modify the orders passed from time to time under a view of the provisions of Regulation XI of 1825 and Act IV (B.C.) of 1868 now declared by the highest judicial authority to be erroneous.

2. Circular Orders No. 12 of June 1869, No. 8 of June 1871, and No. 4 of September 1872, are accordingly cancelled, and the following rules should be substituted for the present Clauses 8, 8A, and 8B of Section IX, Chapter XX (pp. 283, 284) Board's Rules :—

8. Whenever the Collector may receive information by report from the Survey Department or from any other quarter, that an island chur has formed in any large navigable river within his jurisdiction, he shall proceed to enquire whether the alluvial formation or any part of it occupies a site identifiable as having once belonged to an estate on which no remission of revenue has been allowed in respect of such site or to a valid lakheraj tenure. If the whole formation occupy such a site, the Collector shall take no further proceedings.

8A. If, on the other hand, the formation, or any part of it, does not occupy a site so identifiable, the Collector shall next proceed to consider whether such formation or such part of it comes properly under the description contained in Clause 3, Section 4, Regulation XI of 1825. If he find that it does, he should at once proceed, under the authority conveyed by Section 3, Act IV (B.C.) of 1868, to take possession.

8B. This should be done in the usual native method, *viz.*, by erecting a long bamboo on the land in the presence of some of the chokidars or chief inhabitants of the neighbouring villages. A proceeding should be recorded on the spot by the officer effecting the occupation, and should be attested

---

* 14 W. R., P. C., 11.

Digitized by Google

by the witnesses. This proceeding should contain as exact a statement of the position and area of the land as can be made with compass bearings of conspicuous objects on the mainland.

8C. Possession assumed under Rule 8A should be merely temporary until it has been ascertained whether or not the channel round the island is fordable throughout the year. If the channel be found to be not so fordable, the land should be considered the property of Government and should be settled.

8D. In every succeeding year, up to the time when the island may come under settlement, enquiry should be made at the end of the rainy season into its condition and the rights of Government re-asserted whenever necessary.

8E. A Register should be kept in the following form :—

(1) Serial Number, (2) Name of Pergunnah, (3) Name of River, (4) Date of occupation of Island, with description of area and bearings, (5) (6) &c., Particulars of subsequent yearly enquiries, (7) Date of Settlement.

8F. In these cases the zemindaree title being vested in Government, no party can have any *right* to engage. Should any person, however, acting in good faith, have broken up the soil, his prior occupancy may be respected. Islands so situate, and increments thereto, may, subject to the provisions of Act IX of 1847, be assessed without resumption proceedings.

Corrections in Rule 8 *of Board's Rules, published with Circular Order No.* 1 *of December* 1874.

No. 6.

THE following corrections have been made in Rule 8 of the Board's Rules, published with Circular Order No. 1 of December 1874 :—

Line 3, for the words "a whole page" substitute the words, "half a page at least, "and more if the nature of the collection "requires it."

Line 5, for "each letter as it is received or issued," read "the subject of each new "file as it is formed."

Lines 9 and 10, erase the words "column 2 of the Register will shew the number of the file within which the letter is placed."

Draws attention and makes addition Sec. 13, *Ch. XI, p.* 188 *of Boa regarding the withdrawing of mon Government treasury under a power*

No. 7.

A CASE has recently occurred deposit-money was fraudulently w from a Government treasury on a attorney professing to have been gi person who, as was afterwards di had died long before the alleged d execution. The Member in charg fore, thinks it necessary again to attention of Collectors and Officers of treasuries, to Clause 9, Section ter XI (page 188) of the Board's which the following sentence sh added :—"Particular attention sh "directed to the signature and at "and the disbursing officer should "greatest care to assure himself "genuineness."

Requests local officers to make thems quainted with the facts, in respect to vention of parties having rights be zemindars and the cultivators, befor mending in future any remission of re zemindars upon condition that the ryo participate in it.

No. 8.

SOME years ago, Government gr zemindar of a certain estate an ab of revenue upon condition that th should participate in the benefit abatement. The ryots not having the benefit refused payment of their whereupon the putneedar, whose ex was not known to Government at th the remission was granted, institute and obtained decrees for the full am arrears due.

2. In point of fact, Government doned a certain amount of its revent the object of benefiting the ryots ; b arrangement having been entered in a person who had no authority to ful conditions, the stipulation made in f the ryots has remained inoperative, th effect of the concession made by G ment being to increase the profits putneedar.

3. Under the circumstances disclo this case, the Member in charge, as d by Government, requests that local o will make themselves fully acquainted

Digitized by Google

the facts, in respect to the intervention of parties having rights and interests between the zemindars and the cultivators, before recommending any such remissions in future.

Hon'ble H. L. Dampier.

Notifies changes in the selling price of excise opium with effect from 1st April 1875.

No. 9.

The following changes have been made, with the sanction of Government, in the selling price of excise opium with effect from 1st April 1875 :—

Division.	District.	Selling Price per seer. Present.	Sanctioned.
		Rs.	Rs.
1.—Orissa ...	Balasore ...	25	27
	Cuttack ...	24	25
	Pooree ...		
2.—Dacca ...	Dacca ...	23	24
	Furreedpore		
	Backergunge		
	Mymensingh		
3.—Chota Nagpore	Hazareebagh	22	23
	Lohardugga		
	Singbhoom...		
	Maunbhoom		

2. The rates in the remaining districts will continue as at present.

Substitutes new form of store book for that referred to in Cl. 4, Sec. III, p. 305 of Board's Rules.

No. 10.

The following form is substituted for the form now in use of the store book, referred to in Clause 4, Section III, page 305 of the Board's Rules.

Non-Judicial Stamps.	Date. Balance. No.	Balance. Val.	Received. No.	Received. Val.	Issued. No.	Issued. Val.	Balance. No.	Balance. Val.	Remarks.
2 annas.									
4 annas.									
8 annas.									
&c., &c									

A similar Form should be adopted for Court Fees Stamps.

APRIL 1875.

Hon'ble V. H. Schalch, C.S.I.

Erratum.

In line 3, para. 11, Clause 3, Section III, Chapter VII, page 150 of the Board's Rules (Circular Order No. 2, of December 1874), for the word "half" read "portion;" and in lines 7-8, omit the words "This item will always be half the item entered on the disbursement side, column 12, as road cess payable."

Draws attention to Act IX of 1875 regarding Majority of Minors.

No. 1.

The attention of District and Divisional officers is drawn to Act IX of 1875, which provides that, subject to certain reservations stated in the second section, every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards, shall be deemed to have attained his majority when he shall have completed his age of twenty-one years, and not before. The Act will come into force on the 2nd June next, and as soon as possible after that date a list of all minors whose estates are under the charge of the revenue authorities should be submitted for each division, shewing the corrected dates for the attainment of majority by such minors.

2. The change should also be carefully borne in mind in proposing any arrangements connected with the property of minors.

Alterations in Waste Land Rules, and substitution of new form of Table III, Return XLV for that at page 24 of those Rules.

No. 2.

The following words should be inserted at page 32,* line 8, para. 9, of the Rules for the sale of Waste Lands after the words "leasehold grants :" "or to re-sales for default of payment."

* *i. e.*, in Board's letter No. 184A, dated 2nd April 1874, addressed to all Commissioners.

The following form of Table III (Interest due) of Return No. XLV has been substituted

Digitized by Google

for the table appended to page 24 of the Rules for the sale of Waste Lands—

TABLE III—*Interest due.*

1	2	3	4	5	6	7	8
	Interest due at the beginning of the year.	Interest accrued during the year.	Total of columns 2 & 3.	Amount of interest paid off.	*Amount of interest remitted or cancelled.* Cite orders.	Total of columns 5 & 6.	Balance of interest (col. 4 minus col. 7).
Table II A.							
Table II B.							

Note.—As no balances of interest are allowed, all interest unpaid must be accounted for.
The Superintendent of Stationery will be directed to print and issue separate slips for Table III, which can be pasted on to the forms at present in stock in the district offices.

Adds Cl. 12*A*, *S. VI, Ch. XVIII, p.* 260*b*, *Board's Rules regarding Commissioners noticing working of fund for improvement of Government and temporarily settled estates.*

No. 3.

THE following has been added as clause 12A, Section VI, Chapter XVIII, page 260 b of the Board's Rules :—

12A. Each Commissioner should also notice the working of the fund for the improvement of Government and temporarily settled estates, shewing the total amount assigned, its distribution, and the practical results obtained under the several heads of (1) primary education, (2) roads and communications, and (3) miscellaneous local improvements.

Substitutes rules for Cl. 10, *S. IX, Chapter XX, p.* 284 *of Board's Rules, regarding allowances to settlement-holders, &c.*

No. 4.

THE following rules have been substituted for Clause 10, Section IX, Chapter XX, page 284 of the Board's Rules :—

10. The allowances to be granted to settlement-holders and farmers of estates hereafter settled or let in farm, fixed according to the following ru

(1.) In Government estates tenure-holders or with one or mo ryots as representatives of the r a farmer, when, under special cir settlement with a farmer is rendere 20 per cent. of the gross assets allowed for collection expenses.

(2.) In resumed estates settle proprietors, a consolidated allow per cent. should be given for expenses and proprietary allowanc

(3.) In estates let in farm, in c of the refusal of the proprietors settlement, a consolidated allow per cent. should be given for expenses and farming profits, and should be allowed as malikan proprietor.

It is to be observed that the co allowances under the above rules calculated upon the assets of the e deductions have been made for fees, and for any other items fa the heading of "other expenses, i

10A. The assests of an estate taken to be the total rent which would be reasonably expected to by all the cultivating ryots ther this modification, however, that would be liable to enhancement a of settlement, when such enhanc be reasonably considered warrantab in estates where there are no un or middlemen between the settlem and the cultivating ryots, the gross the estate (or such enhancement might be considered reasonable), w the assessment for the calculatio proportion divisible between the Go and the proprietor.

10B. In estates containing tenu description mentioned in the first a class of Section 37 of Act XI of rent paid for such tenures will be the assets thereof, and the calcu based thereon.

10C. Tenures of the third class, in that section, will be liable to enh if found at the time of re-settlem held at inadequate rates ; and the r fixed for them at the settlement wil to be their assets.

10D. In all estates which may temporarily settled, and are a brought under re-settlement, leases for periods extending beyond the te former settlement will be voidabl

Digitized by Google

expiry of the settlement, for the period of which only the settlement-holder could grant them. In Eastern Bengal it has been not unfrequent for holders of temporarily settled estates to grant tenures called *ausats* and *houlahs*; but the grant of such tenures cannot, in any case, be allowed to affect the revenue payable to Government, and the tenures must be assessed at the rates they can reasonably and fairly pay.

States that revised forms of Return No. XII and Register No. 65 have been prescribed.

No. 5.

REVISED forms of Return No. XII and Register No. 65 have been prescribed, and will be issued from the Alipore Jail Press. As there is a large number of the old forms in store, the Superintendent of Stationery has been desired to utilise them before the new forms are distributed. The additional information which is required in the revised form can be given in the column of remarks in each case.

Revised Form of Return No. XII.

1. Name of estate. 2. Rates assessed on soils. 3. Classes of tenants or occupiers. 4. Character of settlement. 5. Term of settlement. 6. Old assessment. 7. New assessment. 8. Increase. 9. Decrease 10. Date of order. 11. By what authority ordered. 12. Date from which revised assessment takes effect. 13. Remarks.

The following should be substituted for the description of Register No. 65, given at page 224 of the Board's Rules :—

Register (No. 65) of Alterations of Assessment.

1. Number. 2. Name of estate. 3. Name of Pergunnah in which the estate is situate. 4. Rates assessed on soils. 5. Classes of tenants or occupiers. 6. Character of settlement. 7. Term of settlement. 8. Assessment in books. 9. Assessment to be substituted. 10. Date on which new assessment takes effect. 11. Increase. 12. Decrease. 13. Date of orders. 14. By what authority ordered. 15. Remarks.

Alterations and additions to Return No. XXXI.

No. 6.

PENDING the issue of a revised edition of the form of Return No. XXXI, the following alterations and additions should be made in the edition of the form now is use, and should be carefully attended to in filling up the forms.

2. To the note over the left hand corner of Table I, add the words "The instructions contained in Board's Circular Order No. 4 of October 1873, regarding zaripeshgi leases, must be strictly observed."

In the heading of columns 2 and 3 of the same Table add to the words "current" and "arrear," respectively, the words "including interest thereon if any." Similar additions should be made in columns 10 and 11, *vide* Circular Order No. 9 of December 1872.

Digitized by Google

3. A similar note to that added to the note over Table I should be inserted over the right hand corner of Table IV. In the heading of columns 1 and 2 and 3 and 4 of Table IV, after the words "claims at date of" and "incurred since," substitute for the word "attachment" the words "assumption of charge."

4. Table VI—"IV. Debts recovered (Table III, col. 5)," should be made a sub-head, 1, and the general heading should be "IV. Receipts exhibited in Tables III and V." The present sub-heads—"1. Lands sold (Table V, col. 5)," "2. Mortgages repaid (Table V, col. 5)," "3. Securities sold (Table V, col. 5)," will then become 2, 3, and 4, respectively.

This portion of the Table will therefore stand thus :—

IV.—RECEIPTS EXHIBITED IN TABLES III AND V.

1.	Debts recovered (Table III, col. 5) ..	1,000	
2.	Lands sold (Table V, col. 5)	1,000	
3.	Mortgages repaid (ditto)	1,000	
4.	Securities sold (ditto)	1,000	
			4,000

The words "state how the sum on which income tax is paid has been arrived at" in parenthesis on the receipt side of Table VI, should be struck out, and the following foot-note should be added with reference to headings V-7, VIII-3, and XII-6 :—"If the amounts are large, the principal items should be explained."

5. The following alterations should be made on the back of the Return :—

In line 1 before the words "The estate," prefix the words "charge of," and in the same line substitute "assumed" for "attached." In line 2 for the words "under which this office assumed," substitute "*directing* assumption of."

At the end of the page alter the word "zillah" "to district."

In line 1 of the last foot-note on the back of the Return, substitute for the words "A ward's estate or managed as a ward's estate," the words "the property of a minor."

6. The following alterations should be made in the test Table for the preparation of Return No. XXXI :—

In test LV, insert the figure "1" after the numeral "IV."

In test LVI, instead of the words "shewn here," substitute "sold shewn against heading IV-2."

In test LVII, substitute for the word "here" the words "against heading IV-3."

In test LVIII, strike out the word "here," and insert "under heading IV-4."

Digitized by Google

MAY 1875.

HON'BLE V. H. SCHALCH, C.S.I.

The instructions contained in C. O. No. 2 of December 1873, will now apply only to cases where land is taken up for a company or municipality.

No. 1.

PARA. 28 of the instructions for the guidance of Collectors in the acquisition of land for public purposes having been cancelled by Circular Order No. 10 of March 1874, District Officers should distinctly understand that the instructions contained in Circular Order No. 2 of December 1873, will now only apply to cases where land is taken up for a company or municipality, and not to cases of land acquisition on behalf of a Department of Government.

Expunges certain words from cl. 3, S. VI, Ch. III, (page 44) of Board's Rules.

No. 2.

UNDER orders from Government, the Member in charge directs that the words noted in the margin, shall be expunged from Clause 3, Section VI, Chapter III (page 44) of the Board's Rules.

"That in the preparation of pleadings, where the issue is on a matter of fact only, the Collector need not refer the pleadings for the sanction of the Commissioners and the Legal Remembrancer;" and the word "such" in line 7.

2. Henceforward the rules as to reference of cases to the Legal Remembrancer, laid down for Government suits, will apply equally to suits on behalf of Wards estates or other estates, the property of private persons, managed by the Revenue authorities. Collectors and Government Pleaders are accordingly warned that a neglect of the rule now laid down will render them liable to be held responsible for the consequences, pecuniary and otherwise, which may result from failure of cases.

Substitutes new rules for Ch. XI, S. VI, page 179 of Board's Rules.

No. 3.

CHAPTER XI, Section VI, page 179 of the Board's Rules is cancelled, and the following substituted :—

1. The Bengal Embankment Act VI (B.C.) of 1873 differs from the preceding Acts relating to the same subject, mainly in the following particulars :—

(*a.*) All public embankments are divided into two classes: first, those entered in Schedule D, the whole expenses attending which are to be borne by Government; and, second, those not entered in the said Schedule. The expenses attaching to the latter, when taken charge of by Government, are to be borne, not as formerly, by the parties bound to maintain them (see Section II of Act XXXII of 1855), but by the zemindars of the estates and proprietors* of the tenures* which may be benefited or protected by the embankments.

* The definition of these words in the Act should be noted.

(*b.*) To carry out this new principle, provisions are made for the due notification to the parties interested of the works proposed to be taken in hand, of their estimated and actual cost, and of the amount of expenses payable by each class, and also for the recovery by Government of the cost from

Digitized by Google

the zemindars, and for the reimbursement to the zemindars of the proportion payable by proprietors, and to proprietors of that payable by sub-proprietors.

(*c.*) Provision is made in Part III for immediate action in certain cases of emergency.

(*d.*) The procedure for the acquisition of land in such cases, and for the determination of compensation for consequent damages, is described in Part V of the Act.

2. The Act also contains a new feature in bringing under the control of the Collector, the management, improvement, and alteration of watercourses in certain cases; and as there is reason to suppose that much of the unhealthiness of portions of the country is due to defective drainage, the attention of Collectors is especially drawn to the power for good in this respect now placed in their hands.

3. Great care should, however, be taken to avoid the construction of new embankments or other works which are not absolutely necessary. To ensure due consideration of the necessity of works, it has been decided that for the present a Collector shall, before taking any action under Section 5 of the Act, submit a full report on the case to the Commissioner. This report should be forwarded by the Commissioner to the Board, with an expression of his own opinion as to the necessity or otherwise of the proposed work.

4. Even in cases where resort to the procedure of Section 5 would involve "delay * * * likely to be attended with grave and imminent danger to life or property" (and it is only to such cases that the procedure described in Part III of the Act applies), the most careful consideration compatible with the circumstances should be bestowed on each case, and simultaneously with action taken under Section 11, a report should be submitted to the Commissioner, who should jealously watch any attempt to strain the provisions of that Section. Neglect on this point may, under Section 15, involve Government in large pecuniary liabilities.

Various alterations in S. III, Ch. XIX, page 266, Board's Rules, and cancellation of Circular No. 20 of 1871.

No. 4.

IN the correction made by Circular Order No. 3 of February 1871, in Clause 4, Section III, Chapter XIX, page 266, Board's Rules, omit the words "to the Board for transmission" and for "publishers" read "publisher." In Clause 5, line 1, for "publishers" read "publisher." Circular Order No. 20 of April 1871 is hereby cancelled, and the words "calculating the time required for transit by post," struck out by that Circular Order from line 8 of the Clause, should be restored. In the 9th line, the words "Collector should" will take the place of "the Board will." At the end of the Clause, add the words—"The Collector must satisfy himself that the notices for his District do actually appear both in English and Vernacular in the proper Gazettes."

HON'BLE H. L. DAMPIER.

Makes an addition to cl. 6, page 49 of Board's Rules.

No. 5.

THE following is added to Clause 6, page 49 of the Board's Rules:—

When, however, security is taken, the bond should be registered, and the registration fee should form part of the expenses incidental to the batwara, the amount being estimated for and entered in the statement prescribed in Clause 4.

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google